IN THE

# Supreme Court of the United States

AUG 30 19[illegible]
JAMES R. [illegible], Clerk

OCTOBER TERM, 1958

No. 3

EDWARD SIMON WEIN,

*Petitioner,*

*vs.*

STATE OF CALIFORNIA.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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STATE OF CALIFORNIA.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, Edward Simon Wein, prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of California whereby the judgments of conviction and orders denying the motion for a new trial by the Superior Court of the State of California, in and for the County of Los Angeles, were affirmed.

### Opinion Below.

The trial court rendered no opinion.

The Opinion[1] of the court below is reported at 50 A. C. No. 9, p. 316, 326 P. 2d 457. It is set out hereinafter as Appendix A. The Opinion was modified, 50 A. C. No. 13, p. 504, 326 P. 2d 457 at 461 [Record, Folder III, Modification of Opinion] (Appendix B).

[1]The record is in 3 Folders. Reference will be made to the respective folder where the document is to be found, as well as identification of the document and the page of the document to which reference is made.

The judgment of the court below, per the practice in California, is the last sentence of the Opinion [Record, Folder III, Opinion, p. 38] (Appendix A, p. 31). It reads, "The motion to augment the record is denied. The judgments and the order denying a new trial are affirmed."

Mr. Justice Carter of the Supreme Court dissented on four grounds. The dissent is found commencing at 50 A. C., p. 344, 326 P. 2d 474. It concludes at 50 A. C., p. 360, 326 P. 2d 484:

> "I conclude that the death penalties inflicted on this defendant for moving five victims from four to 75 feet cannot stand in the face of the constitutional mandate that cruel or unusual punishments may not be inflicted. The judgments must therefore be reversed. The acts of moving K.S. 10 feet and A.C. 13 feet are serious enough to warrant punishment. The minimum punishment prescribed for these acts, one year in the state prison, may not be excessive for them." [Record, Folder III, Dissenting Opinion, pp. 30, 31.] (Appendix A, p. 55.)

## Jurisdiction.

1. The judgment of the Supreme Court of California was dated and entered May 27, 1958 (50 A. C., p. 316, 326 P. 2d 457) [Record, Folder III, Opinion] (Appendix A). The said judgment was modified, 50 A. C., p. 504, 326 P. 2d 457, 461) [Record, Folder III, Modification of Opinion].

2. Petition for Rehearing in the Supreme Court of the State of California was denied June 25, 1958 (50 A. C. No. 13, Minutes, p. 1); Carter, Justice, being of the opinion that the petition should be granted [Record, Folder III, Ordering Deny Rehearing].



3. No extension of time within which to petition for certiorari has been requested.

4. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 2101(d) and Rule 22(1) of this Court.

## Questions Presented for Review.

I.

The petitioner was held by the police for five days without being taken before a committing magistrate. There was unnecessary delay in arraigning the petitioner during which time he was exhibited to public view by way of television, newspapers and in show-ups; confronted by witnesses, accusatory statements made, his replies used against him; identification was made by reason of the conduct of officers during the period between arrest and arraignment, in violation of his constitutional rights. It amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The defendant, your petitioner, was denied that fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States; the conduct of the trial and the incidents occurring therein violated due process.

III.

The representation of the defendant by his trial counsel was constitutionally inadequate and did not meet the exacting standard of representation under the Fourteenth Amendment to the United States Constitution. The defendant was denied adequate representation of counsel despite the fact that counsel of his own choice was present in court.

IV.

The withdrawal of the plea of not guilty by reason of insanity was not free or voluntary and acceptance of withdrawal of such plea, without advising the appellant of the consequences thereof constitutes violation of due process.

V.

The trial court committed prejudicial error in failing to instruct the jury that the subject of a possible commutation of a life sentence by the governor or a change in the law should not be considered by them in their deliberations. This was aggravated by the prosecuting attorney in *voir dire* examination and in argument to the jury suggesting that life imprisonment without the possibility of parole might be affected by executive clemency or by legislative abolition of the death penalty.

VI.

The punishments (death sentences) inflicted in this case are cruel, inhuman and unsual and in violation of the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.

## VII.

Section 209 of the Penal Code of the State of California is unconstitutional in that it is so indefinite and uncertain as to utterly fail to give notice of what is charged or condemned. It violates due process in violation of the Fourteenth Amendment to the Constitution of the United States.

### Constitutional Provisions Involved.

*Sixth Amendment* to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

*Eighth Amendment* to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

*Section 1 of the Fourteenth Amendment* to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Facts Material to a Consideration of the Questions Presented Herein.

The defendant and appellant by Information filed by the District Attorney of Los Angeles County was charged with violation of Section 209, Penal Code (kidnaping for the purpose of robbery) in Counts 1, 5, 14, 18 and 21; the crime of robbery (211 P. C.) in Counts 2, 6, and 19; rape (261:3 P. C.), Counts 3, 7, 10, 12, 15, 20; violation of Section 288a, Penal Code, in Counts 4, 8, 11, 13, 15 and 22; violation of Section 207, Penal Code (kidnaping), in Counts 9 and 17 [to be found in Clerk's Transcript, Superior Court, Los Angeles County, California, pp. 1-22, Folder I, Record on Appeal].

To the Information the defendant entered a plea of not guilty and not guilty by reason of insanity. Doctors were appointed to report on the sanity of the defendant and did so [Clerk's Transcript, Superior Court, Los Angeles County, California, p. 25, Folder I, Record on Appeal].

The defendant and petitioner withdrew his plea of "not guilty by reason of insanity", and the matter proceeded to trial before a jury [Clerk's Transcript, p. 45, Superior Court, Los Angeles County, California, Folder I, Record on Appeal].

After a trial by jury the defendant was found guilty of all counts and thereafter five death sentences were pronounced as well as other judgments for long periods of confinement.

The appeal from the death sentences was automatic under Section 1239, subdivision b, Penal Code, California, thus compelling review by the Supreme Court of the death sentences. No appeal from any of the other judgments, some involving life imprisonment, was taken by the then counsel for the defendant and your petitioner.

## STATEMENT OF THE CASE.

### Manner Federal Questions Were Raised and Rulings Thereon.

To be candid with the Court, the Federal questions raised herein were not as such raised in the trial court but were raised by counsel who conducted the appeal before the Supreme Court of California. This is one of the principal things for which we contend. The totality of legal representation at the trial was constitutionally inadequate. The prosecutor was permitted to indulge in the most vicious misconduct without objection, except in a single instance. The representation of the defendant by his trial counsel was constitutionally inadequate and did not meet the standard of representation under the Fourteenth Amendment to the Constitution of the United States. The defendant was denied adequate assistance of counsel.

The questions presented herein were fully presented to the Supreme Court of the State of California.

### Preliminary Statement.

This case involves the infliction of the death penalty upon a man charged and convicted of offenses compounded from charges of kidnaping for rape where none of the alleged victims were moved more than from one room to another in their own homes; where none of the alleged victims suffered death or real severe personal injuries other than sexual contact.

This is one of the cases where the fixing of the penalty was left to the jury, and but for the gross misconduct of

the prosecution and the unfairness of the conduct of the trial, it is inconceivable that the death penalty would have been inflicted.

**Evidence by the Witnesses as Found by the Jury.**

1. The perpetrator of the offenses seized M. M. and tied her hands behind her with wire. He held a knife in her back while she searched for her billfold. Then he ordered her to crawl through her house to the bedroom. There he robbed her of $17 or $18, raped her, and forced her to an act of fellation. He forced her to move altogether about 75 feet under duress.

2. He seized L. S. and bound her hands with wire. He dragged her by the hair 3 or 4 feet into a bedroom, then threw her 2 or 3 feet onto the bed. He raped her, forced her to an act of fellation and cut her with his knife. He then dragged her into a second bedroom an unstated distance away and locked her in a closet. He stole $200 in cash and a $4,000 money order.

3. He seized C. F. in her bedroom and bound her hands with wire. He asked her for her money. She said she had $10 in the kitchen but he did not look for it. He did not take the $1.00 he found in her billfold. Then, to quote the victim, ". . . he helped me up on the bed." The distance was 4 or 5 feet. He then raped her and forced her into perversion.

4. He seized L. B. in her bedroom and bound her hands with wire. He took valuable jewelry and $30 to $40 in cash. He forced her to walk back about 12 feet

to a daybed, and, when she complained of discomfort, he told her to get up and pushed her 4½ or 5 feet to a chair. Then he raped her.

5. He seized and bound the hands of U. H. in her living room. He said he was going to rob her and she said, "'Here is everything I have, go ahead and take it.'" She wore jewelry and her purse was on a sofa in the same room. But he took nothing. He pushed her to the floor 5 feet away in the center of the room and forced her into perversion.

The jury also found that perpetrator did these acts:

6. He seized and bound K. S., aged 15, shoved her 2 feet into a bedroom, raped her and violated Penal Code, Section 288a. Afterwards she walked 8 feet at his command.

7. He seized and beat A. C. He moved her 13 feet into a closet and fled.

8. He and an accomplice seized A. H. and "dragged her out onto the floor," a distance of about 3 feet. Perpetrator raped her and committed the perverse act.

**Defense Evidence.**

Opposed to this the defendant took the stand; denied that he had assaulted any of the women or that he was the man involved in any of the transactions. He offered a substantial alibi substantiated by reliable people, as indicated by the record. He offered evidence as to the condition of his eyes showing that he had a marked slant in one eye, very noticeable, and supported this testimony by

that of an expert opthalmologist. Only one witness was able to say that the perpetrator of these offenses had any visible impairment of the eyes. This impairment was permanent.

The defendant had been in the service from 1942 to 1946; had been overseas; while there had broken his back and had been hospitalized for a time; had received Government disability [Record, Folder II, Reporter's Transcript, Volume V, pp. 833-835].

The evidence showed he was a painting contractor and had had a substantial business and some property; had been married and separated. A number of substantial persons testified as to his good general reputation in the community, and it was stipulated and the persons named that some 21 additional persons would testify as to his good general reputation in the community [Record, Folder II, Reporter's Transcript, Volume V, pp. 765-769].

## REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

### I.

**The Petitioner Was Held by the Police for Five Days Without Being Taken Before a Committing Magistrate. There Was Unnecessary Delay in Arraigning the Petitioner During Which Time He Was Exhibited to Public View by Way of Television, Newspapers and in Showups; Confronted by Witnesses, Accusatory Statements Made, His Replies Used Against Him; Identification Was Made by Reason of the Conduct of Officers During the Period Between Arrest and Arraignment, in Violation of His Constitutional Rights. It Amounted to a Denial of Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States.**

(a) Your petitioner made a motion to augment the record before the Supreme Court of California so that that court would have before it a certified copy of the Minutes of the Municipal Court showing the date of his arraignment, supplemented by a verified petition which showed that five days had elapsed between the time of the defendant, your petitioner's, arrest and his arraignment in court. The Supreme Court of California denied the motion to augment the record which was made prior to oral argument [see Motion to Augment Record, Certified Copy of the Minutes of the Municipal Court attached thereto, Record on Appeal, Folder III].

Subsequently your petitioner filed a formal application to recall the remittitur and sought an order by the Supreme Court for the purpose of taking testimony before the Superior Court (trial court) so that all of the facts

concerning the "unnecessary delay" in arraigning this defendant, your petitioner, could be before the Supreme Court. August 6, 1958 this application was denied (50 A. C. No. 19, Minutes, p. 1).

(b) From the time of your petitioner's arrest to the time of his arraignment five days elapsed, during which he was first taken to the Long Beach City Jail.

(c) Next, the deputy sheriff who was with your petitioner at the time of his arrest stated, "You had better confess, Eddie, or they will make it go hard on you."

Shortly after being placed in the Long Beach Jail, two Los Angeles detectives arrived; they placed handcuffs on your petitioner, put him in a car, and the handcuffs were not removed for nine hours. Your petitioner and Crawford were driven to where Crawford's car was parked; Crawford then got into his car and followed the officers and petitioner. The detectives then searched, without benefit of search warrant, petitioner's truck. They took many papers from the truck, which your petitioner was never permitted to see again. The officers then drove your petitioner to within two blocks of Crawford's home and parked; then Crawford drove away, leaving petitioner and the officers. In about fifteen minutes Crawford returned and handed over to the detectives petitioner's personal belongings which had been at Crawford's house, your petitioner having been staying there temporarily with Crawford. The officers then drove petitioner to the Hollywood Police Station. Petitioner was taken upstairs, placed in a chair, and sat there until noon of that day. Many people passed through the room; petitioner is informed it was the complaint room. In the afternoon petitioner was interrogated by the officers, and petitioner was told by the detectives that if "you do not confess you

will get the same prosecutor that Chessman had and they will make another Chessman out of you". Later the officers said, "You will die long before Chessman dies." Petitioner was told that if he would confess, "not much will happen to you". Some time later Crawford returned and suggested that petitioner plead guilty. Crawford then left. The police returned and continued to question your petitioner as to his whereabouts on various days. Your petitioner replied he could not answer for certainty without access to his business records and his diary which would indicate to petitioner where he was on days past. Petitioner told the detectives where they could get his business records and diary. The detectives replied it would be of no use to see these things because "we know you are the guilty party". Continuously for four days when petitioner was questioned he asked for permission to see his records and diary. They were never given to him. After four days of questioning and examination and exhibition, your petitioner was taken to a cafe on Sunset Boulevard, Los Angeles, then was returned to the station and booked and finger-printed. Petitioner then was taken downtown to the jail and a jail photograph or "mug" taken of your petitioner. Petitioner was then taken down to the basement where there was a newspaper reporter and a photographer waiting. The police made your petitioner take his glasses off; photographs were then taken of your petitioner with his glasses off. Petitioner was then told by the detectives, you are a rapist; then the reporters said, you are a rapist. The next day your petitioner was told to comb his hair, and then he was taken to a home in the Hollywood Hills. Before petitioner left the police station, a number of newspaper reporters and photographers gathered around your petitioner in the po-

lice station and his pictures were taken. In front of the reporters and photographers your petitioner was called numerous vile names by the detectives.

After being taken to the home in the Hollywood Hills, Mrs. Manning, who claims to have identified your petitioner, and another witness who later testified as to the license of a car allegedly driven by your petitioner, were present, and the police permitted Mrs. Manning to question your petitioner.

(d) Next the detectives drove your petitioner to North Hollywood; Mr. Crawford followed in his car. Your petitioner was taken to the home of another witness, the boy who testified concerning an automobile, and this boy looked at Crawford's car.

(e) Thereafter your petitioner was put through many lineups, and in each instance the people viewing your petitioner were permitted to see him before he was even put in the actual lineup. Your petitioner was required to walk to the lineup room and pass through a corridor that faced the room where the viewers were. The door into the corridor was always open, and your petitioner could see many people in the room who were the viewers, and they could see your petitioner. After one of the lineups Mrs. Bothman, a witness, was present, and she confronted your petitioner, with the permission of the police, in the corridor, and your petitioner was asked by her, "Are you the man who came to my house?" Your petitioner replied, he was not. Thereupon the police became very angry and shouted at your petitioner and said, "You cannot talk to any witnesses" and immediately put your petitioner in a cell. At another lineup or showup, the police permitted a witness to question your petitioner. Your petitioner then

replied, "If I can have my lawyer present I will talk to the witness."

(f) About the third day your petitioner was directed to clean up, and he was then taken to the office of the District Attorney of Los Angeles County in the Hall of Justice. At that time your petitioner said to the police, "I do not want to go to the District Attorney's office without my lawyer. I do not want to talk to anyone without my lawyer being present." Your petitioner was taken against his consent and will to the office of the District Attorney. He was led into a room that was filled with newspaper reporters, cameras, T-V cameras, and even sound tracks upon which T-V talk is recorded. Your petitioner then said, "I do not want to talk. I want my lawyer present or I will not speak. I am entitled to have my lawyer." The District Attorney himself then entered the room and commenced talking to your petitioner. The police then came over to your petitioner and made him give the police his glasses. Then additional pictures were taken by the newspaper photographers and the T-V photographers of your petitioner. Again the District Attorney started to talk to your petitioner and again your petitioner replied, "I do not want to talk unless my lawyer is called." The District Attorney kept talking to your petitioner, asking questions. While this was going on, the photographers would interrupt and urge your petitioner to take different poses and the police made your affiant do so, against his wishes and will.

(g) During one of the showups, your petitioner asked the police if he could see the witness; if he could talk to the witness. This was denied your petitioner.

(h) About the third day your petitioner was forced against his will to give an interview to a newspaper re-

porter, and while the newspaper reporter was talking to your petitioner, the police read a crank letter to the newspaper reporter.

(i) On one of the days, about the third day after your petitioner was taken into custody, your petitioner was given a glass of tea in a fancy glass, without any explanation, and required to drink it by the detectives.

(j) Throughout the questioning which lasted almost five days, the detectives continued to tell your petitioner that if your petitioner did not "hurry up and confess, they would keep putting his picture in the paper and charge him with more offenses, including murder".

(k) On the day of petitioner's arrest, his glasses were taken from him and only returned to him when the police brought witnesses or newspaper reporters to see your petitioner.

(l) On the fourth day after your petitioner was taken into custody, he was taken to the Hall of Justice, but nothing was done. Your petitioner was not taken to a committing magistrate, notwithstanding there are at least eight or nine branches of the Municipal Court of Los Angeles City and County in the Hall of Justice, and there is a judge on duty at nearly all times; in fact, the district attorney's office to which your petitioner was taken is only one floor below the floor occupied by a number of municipal court judges, including the judge who commonly and has for years arraigned prisoners charged with felonies. At neither time of the visits to the Hall of Justice, including that to the district attorney's office, was your petitioner taken before a committing magistrate and informed of the charges against him.

(m) During the five days from the time your petitioner was arrested until he was finally arraigned in the Municipal Court, your petitioner continuously asked to see his attorney and at no time consented to being interviewed by reporters; at no time did your petitioner consent to his photographs being taken; at no time did your petitioner consent to the taking of photographs for television or interviews for television; nor did your petitioner consent to being interviewed by various persons.

Your petitioner respectfully directs the Court's attention to the Application to Recall Remittitur and Petition to Direct Taking of Testimony in Superior Court [Record, Folder III]. Attached to such petition is an affidavit by your petitioner in support of the Motion to Augment the Record.

California Penal Code Section 849 provides as follows:

> "*Person arrested without a warrant to be taken before a magistrate. Information to be filed.* When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before such magistrate."

*Mallory v. United States*, 354 U. S. 449, 1 L. Ed. 2d 1479, we contend, is directly in point where the Court said (354 U. S. 449, at p. 455):

> "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance,

where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

In the instant case the prosecution built its entire case almost from the things they learned during the period between arrest and arraignment in the Municipal Court. Alleged victims were permitted to view the defendant. Against his will he was required to confront the witnesses where accusatory statements were made to him in the absence of his counsel and without his consent. He even sought to obtain the services of his lawyer, without permission. His picture was put in the newspaper; his picture was put on television and circulated throughout Southern California and people were invited to communicate with the police. Alleged victims who had not seen the perpetrator of the offenses for more than a year came forward. Practically all of the evidence against your petitioner was obtained in this manner. In our verified petition set forth before the Supreme Court of the State of California [Record, Folder III, Application to Recall Remittitur] we have fully stated these. Your petitioner was taken to the Hall of Justice in Los Angeles to the office of the district attorney and photographed, interviewed and televised without taking him to the courtrooms of the committing magistrates, a number of whom were but one flight of stairs up.

*None of This Has Ever Been Denied:*

The Supreme Court of California refused to grant petitioner's motion to augment upon the ground that the rules did not at this late date permit the augmentation of the record.

We assert that the Supreme Court of California was in error; that this amounted to a denial of the constitutional rights of this defendant. It violated due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

This Court has passed upon a somewhat similar matter and held it was error to refuse to consider the supplemental record by the Court of Appeals.

See *Höffman v. United States*, 341 U. S. 479, 486-489, 95 L. Ed. 1118, 1125, where the Court said:

> "It appears that the petition which comprised the supplemental record, thereof captioned 'Petition for Reconsideration of Allowance of Bail' was by its terms an application to the district court to vacate the contempt order on constitutional grounds, and alternatively a second motion for bail. Clearly this petition, filed but two weeks after the contempt order, was directed to the petition of the committing court to discharge the contemnor for good cause—a power which courts should be solicitous to invoke when important constitutional objections are renewed. c.f. *Gouled v. U. S.*, 255 U. S. 298, 65 L. ed. 647. The ends of justice require discharge of one having such a right whenever facts appear sufficient to sustain the claim of privilege. *Accordingly the supplemental record should have been considered by the court of appeals.*
>
> "For these reasons we cannot agree with the judgments below. If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty. 'The immediate and potential evils of compulsory self-disclosure transcends any difficulties that the exercise

of the privilege may impose on society in the detection and prosecution of crime.' *United States v. White*, 322 U. S. 694, 698, 88 L. ed. 1542, 1546. Pertinent here is the observation of Justice Brandeis for this Court in *McCarthy v. Arndstein*, 266 U. S. 34, 42, 69 L. ed. 158, 161, 'If Congress should hereafter conclude that a full disclosure * * * by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity.' Reversed."

The denial of this petitioner's right to arraignment without "unnecessary delay" was aggravated by the publicity given, and as was said in *Shepherd v. Florida*, 341 U. S. 50, 95 L. Ed. 740:

> "But prejudicial influences outside the courtroom becoming all too typical of a highly publicized trial were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."

We earnestly contend that under the foregoing facts and law this man's constitutional rights were so invaded that it warrants a hearing by this Court.

See *Fikes v. Alabama*, 352 U. S. 191, 1 L. Ed. 2d 246;

See also the Opinions in *Crooker v. California*, 2 L. Ed. 2d 1448;

*Cicenia v. LaGay*, 2 L. Ed. 2d 1523, and the dissenting opinions in those cases.

Not only was there "unnecessary delay" in taking the defendant-petitioner before the committing magistrate, but it was what was done to him during that time. The entire case against him was practically built during the five days he was questioned; photographed by newspapers and television photographers; confronted by witnesses; forced to meet accusers.

As was said in *Crooker v. California*, in the dissenting opinion, 2 L. Ed. 1448, at p. 1456:

> "* * * We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices. The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion. The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this the most critical period of his ordeal. For what takes place in the secret confines of the police station may be more critical than what takes place at the trial. * * * Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial."

And as was further said in the dissenting opinion in *Crooker v. California, supra*, 2 L. Ed. 1448, at p. 1456:

> "Footnote 1. The use of techniques that make men admit crime they did not commit and embrace ideas they oppose is told in Communist Interrogation, Indoctrination and Exploitation of American Military and Civilian Prisoners, S Rep No. 2832, 84th Cong. 2d Sess.

"Prof. Sam Bass Warner wrote in How Can The Third Degree Be Eliminated?:

"1 Bill of Rights Rev 24, 25 (1940) 'Everywhere the formula for successful detective work is that laid down by former Captain Fiaschetti of the New York City Police: "You get a bit of information, and then you grab the suspect and break him down. That is how detective work is done—a general formula."'

"See Report of Committee on Lawless Enforcement of Law, Am Bar Assn, 1 Am J Police Sci 575."

See also Footnote 2, *Crooker v. California*, 2 L. Ed. 1448, 1457.

As was further said in *Crooker v. California* in the dissenting opinion, *supra*, at p. 1459:

"'Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter he is subject to their uncontrolled will. . . . Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

"The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."

We earnestly contend that holding this man for five days during which he was constantly questioned, confronted with witnesses; exhibited to newspaper and television audiences, by which it was sought to identify the petitioner; taking him to the district attorney's office with

the committing magistrate a few steps away "shocks the conscience".

*Rochin v. California*, 342 U. S. 165, 172, 96 L. Ed. 183, 190.

The officers found time to do everything they wanted to do in the five day period except to walk one flight of steps to the committing magistrate where the petitioner would have been advised of his rights.

## II.

## The Defendant, Your Petitioner, Was Denied That Fair Trial Guaranteed by the Fourteenth Amendment to the Constitution of the United States; the Conduct of the Trial and the Incidents Occurring Therein Violated Due Process.

### (a) Misconduct of the District Attorney.

The misconduct of the district attorney was so flagrant and so voluminous in this matter that we have felt it necessary to prepare separate appendix to this petition, to which we respectfully direct the Court's attention. The same is filed herewith as Appendix "C" and contains as briefly as we could make it a summary of the incidents of misconduct upon the part of the district attorney.

The Supreme Court of California concedes:

> "There was one instance during the prosecutor's argument, however, where he may have strayed beyond the bounds of permissible argument and where a prompt objection was made by defendant's counsel. The prosecutor said, in part, 'Why, this fellow puts Caryl Chessman to shame. He makes a rank amateur out of Caryl Chessman.' At this point, the defense counsel cited this as prejudicial misconduct and requested the jury be instructed to disregard it. The Court denied the request and said, 'go ahead.' He then contrasted Chessman's attacks from an auto-

> mobile disguised as a police vehicle operating in the relative open of the public streets with defendant's assaults in the victims' homes. He then said, 'Chessman, too, had ice water in his veins. That little girl (the fourteen-year-old victim in this case) . . . will carry a mark on her forever. She may end up the same way Mary Alice Meza, the 17-year-old virgin, the victim of the Chessman attack, in a mental institution unless she has a strong mind and can in some way through her religious thinking beat it.'"

He then said "the death penalty was deserved because the defendant displayed the '. . . behavior pattern of a cold cruel individual with ice water in his viens.'" [Record, Folder III, Majority Opinion, pp. 10, 11; Appendix A, p. 9].

It was at this time that this argument became so vicious that counsel for the defendant-appellant finally objected. The court's conduct only served to impress the jury with the propriety of this unfair argument, for the court instead of sustaining an objection, replied, "Go ahead." [Record, Folder II, Reporter's Transcript, Volume VII, pp. 1329, 1330].

It was known to the jury that the prosecutor who tried this case tried the *Chessman* case.[2] For him to quote the evidence in the *Chessman* case as though it was a fact was gross misconduct and denied this defendant a fair trial. It should have been stopped by the trial court.

In connection with an examination of the misconduct of the prosecutor which has been pointed out in the Ap-

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[2]His conduct in the Chessman case was condemned by the Supreme Court of the State of California, *People vs. Chessman*, 38 Cal. 2d 116, 177, 238 P. 2d 1001: "Regretably the prosecuting attorney presented his case in an over-zealous manner both in addressing the jury and in improperly bringing in evidence of misconduct of defendant for which he was not on trial."

pendix filed herewith in great detail, we believe the following should be taken into consideration:

1. That the five offenses of which appellant was found guilty and upon which he was given the death penalty did not involve the taking of a life and the discretion of the punishment, either life imprisonment or death, was left squarely to the discretion of the jury.

2. That it is an absolute rule, without any exceptions, that a defendant in a criminal trial is entitled to a fair trial.

3. That it was the *duty* of the trial court under these circumstances to protect the defendant regardless of the fact that counsel for the defendant made few objections. (Cal. Pen. Code, Sec. 1044.)

4. That it was the duty of the prosecutor as representative of the People to see that the defendant received a fair trial.

> "It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such a procedure amounts to a denial of due process of law. (*Powell v. State of Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527.)"

That the District Attorney, well knowing the law on this subject, intentionally added many counts which were necessarily included offenses for the purpose of intensifying the situation against the appellant.

The petitioner submits to this Honorable Court that he did not get a fair trial and that without the errors and misconduct the jury could well have acquitted him of all the counts against him. It must be borne in mind that he had a clean record, as the record in this trial shows; he took the stand, he testified, and he offered a substantial alibi, and from the beginning has denied his guilt.

III.

**The Representation of the Defendant by His Trial Counsel Was Constitutionally Inadequate and Did Not Meet the Exacting Standard of Representation Under the Fourteenth Amendment to the United States Constitution. The Defendant Was Denied Adequate Representation of Counsel Despite the Fact That Counsel of His Own Choice Was Present in Court.**

The Opinion of the Supreme Court of California itself concedes that there were many errors but sustains the judgment notwithstanding because no objections were made at the time of trial. This, in and of itself, establishes this point we are here making, and it is thoroughly established by the failure of counsel to make any mention whatsoever in the course of the trial court proceedings of the failure to arraign the defendant-petitioner "without unnecessary delay" as required by law and to make no mention of what was done to the defendant-petitioner during the five day delay. We call the Court's attention to an astounding statement by defendant-petitioner's counsel at the commencement of the argument to the jury which amounted to practically a waiver of every right the defendant had, so that we come to this Court after having gone to the Supreme Court of California with a record almost barren of any effort to protect the defendant-petitioner's rights.

The following took place at the commencement of argument by counsel (at the trial) for the defendant-petitioner [Record, Folder II, Reporter's Transcript, Volume VIII, pp. 1251, 1252]:

"Mr. Eagan: It has been a long trial, *but I without reservation say to you it has been a fair trial.* I

have known Mr. Leavy practically all my life. He came to the District Attorney's office shortly after my father left it to go on the bench. Judge Dawson (trial judge) gave me my first cowboy suit when I was five. When I finally passed the bar, much to the amazement of everybody, the first case I tried was in Judge Dawson's court, so when I say to you I say it without reservation, *we have had a fair trial.*"[3] (Emphasis supplied.)

The standard of adequate assistance of counsel was set forth in the recent case of *Lunce v. Overlade*, 244 F. 2d 108, a habeas corpus proceeding. The writ was granted on the ground that the defendant was not competently

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[3]It seems highly probable that the utter failure of the trial court to recognize the inadequacy of petitioner's legal representation was due to the long standing friendship between the court and trial counsel. In California the trial judge is more than a mere legal arbiter.

The trial court was under a duty, where it appeared that the trial counsel through ignorance or otherwise was not protecting the constitutional rights of the petitioner, to step in and make such rulings as would be necessary to prevent a waiver of petitioner's constitutional rights.

Section 1044 of the *Penal Code* provides as follows:

> *Control of Trial.* It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

It has been said in *People v. Golsh*, 63 Cal. App. 609, 219 Pac. 456, 458:

> "The duty of a trial judge, particularly in criminal cases, is more than that of an umpire, and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished. It is his primary duty to see that justice is done, both to the accused and to the People."

*People v. Frahm*, 107 Cal. App. 253, 290 Pac. 678, 682.

represented *by his own counsel.* The Court of Appeals stated as follows:

> "As a rule, an accused cannot proceed to trial with counsel of his own choice and then later claim a denial of due process chargeable to the state because of errors committed by such counsel. (Cases cited.) However, where the representation of an accused by his counsel *is so lacking in diligence and competence* that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention." (Emphasis supplied.)

On this issue, the Court's attention is respectfully invited to the *voir dire* examination conducted by appellant's trial counsel, appearing at pages 25, 35, 40, 44, 54, 56, 72, 76, 79, 106, 123, 168, 212, 219, 235, 247, 254, 261-262, 263, 274, 286, 294-295, 307, 316-317, 322, 327-328, 346, 347, 354, 355, 361, 391, 394, 395, 399, 452-453, 455, 490, 500, 538, 550; Volume I; Volume II, page 560, of the Reporter's Transcript, Record, Folder II. It appears from said *voir dire* examination conducted by appellant's own counsel that appellant's counsel persistently emphasized in effect over and over again for a period of four days the following:

> (a) That the witnesses for the prosecution were all *honest people* and their identification of the appellant was positive; and that
>
> (b) Since the evidence of the prosecution is clear the burden of proof would be cast upon the appellant to prove beyond a reasonable doubt that he was not the perpetrator of the offenses charged in the Information.

The record reflects that appellant's counsel labored under the false illusion that his gentlemanly and courteous deportment in court might induce the deputy district attorney to act in a like gentlemanly manner; and that appellant's counsel did not in any shape or manner seek to protect the constitutional rights of his client.

It seems to us that such strategy employed by the appellant's counsel did not comport with the duties of an attorney in a capital case, when his client's life is at stake.

In *Moore v. State* decided by the United States Supreme Court on December 9, 1957, and reported in Volume 78, Supreme Court Reporter, beginning at page 191, the defendant was convicted of murder. At page 194 of the 78 Supreme Court Reporter, the court stated as follows:

> "The record shows possible defenses which might reasonably have been asserted at trial, but the extent of their availability raised questions of considerable technical difficulty obviously beyond his capacity to comprehend. For, instance, one possible defense was insanity, suggested by the trial judge's statements that 'his one desire is to have it all over, to get to the institution to which he is to be committed, and to be under observation and to be examined * * *'; 'he insists that there is something wrong with his head; that he has had something akin to queer sensations before this.' Another possible defense was mistaken identity, suggested by the fact that the evidence pointing to him as the perpetrator of the crime was entirely circumstantial. (Cases cited.) Moreover, the proceedings to determine the degree of murder, *the outcome of which determined the extent of punishment, introduced their own complexities.* With

> the aid of counsel, the petitioner, who, as we have said, neither testified himself in the proceeding nor cross-examined the prosecution's witnesses, *might have done much to establish a lesser degree of the substantive crime, or to establish facts and make arguments which would have mitigated the sentence.* The right to counsel is not a right confined to representation during the trial on the merits. *Reece v. State of Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77. The circumstances compel the conclusion that the petitioner's rights could not have been fairly protected without the assistance of counsel to help him with his defense." (Emphasis supplied.)

With all due respect to the Court, we assert that the Majority Opinion of the Supreme Court of California itself establishes that trial counsel failed to make adequate objections at appropriate times. That Court justifies such lack of adequate representation by saying, in effect, yes, these things happened, but no objection was made. What better proof could we have that these things of which we complain were done, than the Majority Opinion itself?

For instance the Court said [Record, Folder III, Majority Opinion, p. 8, Appendix A, p. 7]:

> "In effect, he (referring to the prosecutor) did little more than to state general theories underlying criminal prosecutions. *In any event, since defendant failed to object to any of the alleged improper conduct during the deputy district attorney's examination of the veniremen*, he cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been *corrected by proper instructions.*"

Next [Record, Folder III, Majority Opinion, p. 10; Appendix A, p. 8], we find the Court saying:

> "In any event, *no objection was made* in the trial court to any of the above conduct or to certain other matters of which defendant now complains, and *no instructions were asked* with respect thereto."

Next, we find the Court, in effect, concluded that the prosecutor went beyond *the bounds of propriety* [Record, Folder III, Majority Opinion, p. 10; Appendix A, p. 9] where it stated:

> "There was one instance during the prosecutor's argument, however, where he may *have strayed beyond* the bounds of permissible argument and where a prompt objection was made by defendant's counsel."

In this case an objection was made and the court said, "Go ahead." For the Court to say "he strayed beyond the bounds of permissible argument" is really to put this very mildly. This was about as vicious an argument as you will find in the reports.

The Supreme Court of California recognizes that the deputy district attorney did several things which he might well not have done, to put it mildly:

1. He referred to the jurors by name;

2. He urged the death penalty;

3. He used epithets such as "strange breed", "kidnappers", "robbers" and "forcible rapists" [Record, Folder III, Majority Opinion, p. 9; Appendix A, p. 8].

It is true no objection was made. We do not believe this Court should under any circumstances tolerate such conduct in a death penalty case. This conduct on the part of the prosecutor, without objection, we think, establishes our point of inadequate representation.

Next, we find the Majority Opinion, in commenting on an accusatory statement, saying:

> "the second one, where defendant remained silent on the asserted ground that he would not speak unless he had an attorney present, might *well have been excluded* if *objection had been made.* (See *People v. Abbott*, 47 Cal. 2d 362, 373; *People v. McGee*, 31 Cal. 2d 229, 238-240). However, defendant's objection to this line of testimony is made for the first time *on this appeal.*" [Record, Folder III; Majority Opinion, p. 19; Appendix A, p. 16.]

Next, the Court says, in effect, that *no objection* having been made, it was *not necessary to give an* instruction as the Court said:

> "Moreover, the giving of instructions on the definition of an admission, the effect of silence or a false or evasive reply, and the possibility of falsehoods indicating consciousness of guilt (see Cal. Jury Instrns., Crim. (1946 and supp. 1953) Nos. 29, 29-D, 30, 30-A), was not error since the evidence introduced *without objection* could be considered by the jury." [Record, Folder III, Majority Opinion, p. 20; Appendix A, p. 17.]

Then the Court goes on to say, *"there were other incidents in the record, admitted without objection, which fell within these instructions."* [Record, Folder III, Majority Opinion, p. 20; Appendix A, p. 17.] (Emphasis supplied.)

It is respectfully submitted that the *Moore* case is conclusive of the proposition that the defendant-petitioner was denied adequate representation by counsel. The fact that in the case at bar appellant's counsel was in court is of no legal significance, it clearly appearing that appellant's constitutional rights were not protected and the trial was but a sham in the constitutional sense.

## IV.

## The Withdrawal of the Plea of Not Guilty by Reason of Insanity Was Not Free or Voluntary and Acceptance of Withdrawal of Such Plea Without Advising the Appellant of the Consequences Thereof Constitutes Violation of Due Process.

It cannot be successfully denied that the withdrawal of the plea of not guilty by reason of insanity was forced upon the defendant and his counsel [Record, Folder I, Reporter's Transcript, Volume I, pp. 3-6, inclusive]. While it may be that the trial judge had the power to have the case tried before one jury and to order the appellant and prosecution to conduct a *voir dire* examination on all of the issues raised by the plea of not guilty and by the plea of not guilty by reason of insanity at the same time,—such point is of no force on the issue of whether the withdrawal of the plea of not guilty by reason of insanity was voluntary or free implicit in the philosophy of due process of law.

In *People v. Mendez*, 27 Cal. 2d 20, the Court stated at page 22 that the withdrawal of the plea of not guilty in that case was proper for the reason that the withdrawal thereof was free and voluntary, and that from an examination of the defendant the trial court was satisfied that his plea of guilty was free and voluntary.

In *State v. Hill* (1918), 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687, it was stated in an official headnote that

> "a plea of guilty of a capital crime should be accepted cautiously, and not until the court has warned the prisoner and been satisfied that he has acted freely and deliberately after being so admonished, and with full knowledge, appreciation, and understanding of the nature and consequences of his confession; * * *"

In *State v. Ferranto* (1925), 112 Ohio St. 667, 148 N. E. 362, the proposition, but slightly varied, was laid down that:

> "a plea of guilty in a capital offense should be accepted cautiously, and the trial judge should fully advise the accused of his rights in the premises, and be satisfied that he acts willingly, freely, and deliberately after being so advised, and with knowledge, appreciation, and understanding of the nature and consequences of such plea of guilty."

See also, 110 A. L. R. beginning at p. 228; *Smith v. United States,* 238 F. 2d 925, and *United States v. Mack,* 249 F. 2d 421.

In the *Mack* case, *supra,* counsel for the defendant asked leave to withdraw the plea of not guilty and to enter a plea of guilty. The court of appeals ruled that the withdrawal of the plea was not voluntary and that the acceptance of the plea denied the defendant *due process of law for the reason that the defendant had not been advised by the court of the nature of the charges and of the consequences flowing from his plea of guilty.*

We respectfully submit that upon the record the acceptance of the withdrawal of the plea of not guilty by reason of insanity clearly constituted a violation of due process of law. There is nothing in the record to show that appellant was ever advised of the nature of the defense he could interpose under such a plea; nor was the defendant advised that he could not interpose a plea of insanity under his plea of not guilty; nor was the defendant ever advised that he was not bound by the reports of the alienists in which they stated that he was sane; nor was he advised that he had a right to cross-examine the prosecutor's alienists and to call his own alienists to con-

trovert the reports of the prosecutor's alienists; nor was he ever advised that the reports of the alienists were not binding upon him; nor was he advised that the issue of his sanity under his plea of not guilty by reason of insanity presented a jury question and that a jury was not bound by the opinions and the conclusions of the alienists.

## V.

**The Trial Court Committed Prejudicial Error in Failing to Instruct the Jury That the Subject of a Possible Commutation of a Life Sentence by the Governor or a Change in the Law Should Not Be Considered by Them in Their Deliberations. This Was Aggravated by the Prosecuting Attorney in Voir Dire Examination and in Argument to the Jury Suggesting That Life Imprisonment Without the Possibilities of Parole Might Be Affected by Executive Clemency or by Legislative Abolition of the Death Penalty.**

The prosecuting attorney was guilty of prejudicial misconduct, for in his *voir dire* examination and again in his argument to the jury [Record, Folder I, Reporter's Transcript, Volume I, pp. 116-120; Record, Folder II, Reporter's Transcript, Volume VII; pp. 1331-1333], he suggested that life imprisonment without possibility of parole might be affected by executive clemency, or by legislative abolition of the death penalty. The prosecuting attorney also referred to the Legislature's then consideration of a bill proposing a moratorium on the death penalty, leading the jurors to believe that the defendant might well benefit from such a suspension. This argument by the prosecutor was aggravated by the court instructing the jury that they had the right to consider the

effects of both penalties, life or death [Record, Folder II, Clerk's Transcript pp. 122-123].

Since the decision in this case by the Supreme Court of California, in an almost identical situation except that it was not as aggravated as in the instant case, the Supreme Court of the State of New Jersey decided a case which strikes at the very core of the misconduct of the prosecutor and of the utter failure of the court to protect the rights of the defendant under similar circumstances as in the instant case. The prosecutor was permitted to state both in his *voir dire* examination and his argument to the jury that life imprisonment without the possibility of parole did not necessarily mean what it said, since the Governor might comute the sentence or grant a pardon and the Legislature might enact a law changing the sentence.

The trial court gave no cautionary instructions to the jury advising them that they were not to consider the possibility of executive clemency or a change in the law. The New Jersey Supreme Court overruled a long line of cases and held it was prejudicial to the rights of the defendant in a situation where the jury had the alternative of rendering a verdict calling for the death sentence as opposed to life imprisonment, to consider the question of executive clemency or possible change in the law. In the *State of New Jersey v. LeRoy White*, 142 A. 2d 65, decided May 26, 1958, the court had this to say, at p. 76:

> "The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged an-

other agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs. It is no more proper for a jury to conclude that death be the penalty because a life sentence may be commuted or the defendant paroled, than it would be for a trial judge in other criminal causes deliberatly to impose an excessive sentence to frustrate the statutory scheme commiting parole to another agency.

"That death should be inflicted when a life sentence is appropriate is an abhorrent thought. We should not attribute that purpose to the Legislature. The Legislature could not have intended that juries shall weigh the death penalty against something less than a life sentence and by that *process arrive at a* punishment which does not fit the facts."

The Court reversed the judgment and formulated an instruction of its own on this precise subject matter, to be used on a re-trial, a portion of the instruction being as follows (*State v. LeRoy White, supra*, 142 A. 2d 65, at pp. 76, 77):

"You may not speculate as to whether parole would or would not be granted. So far as you are concerned, a life sentence is a life sentence. If upon and after consideration of all the evidence you believe a recommendation for imprisonment for life should be made part of your verdict, it would be a violation of your duty to refuse to make that recommendation because of the existence in another authority of the power and responsibility with respect to parole."

This far-reaching and critical decision, it is submitted, exactly parallels the situation presented in the case at bar. Due to the clever argument of the prosecutor, many of the jurors who may well have voted for life imprisonment, instead of the death penalty, were induced to vote for the death penalty because of the suggestion that the Governor might commute the sentence or the Legislature might change the law. It is common knowledge that illustrations of executive clemency in cases of this character are indeed rare and the jurors were left with the impression that this was practically an everyday occurrence and that if they did not bring in a death penalty verdict, the defendant in a few years would be at liberty.

It is submitted that the failure of the trial court to adequately instruct the jurors that they were not to consider such matters as executive clemency and possible legislative changes, denied to the defendant that fair trial which is accorded to him by the Fourteenth Amendment of the Constitution of the United States.

It is submitted that the failure of the trial court to step in and protect the rights of the defendant accused, when the prosecutor in his *voir dire* examination and in his summation of the case to the jury, made these improper remarks, the failure of the Court to properly instruct the jury on this all-important point, amounted to a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

## VI.

**The Punishments (Death Sentences) Inflicted in This Case Are Cruel, Inhuman and Unusual and in Violation of the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.**

This is another one of the California cases in which the death penalty is being applied for an offense where no one suffered death or really serious injury, other than sexual contact.

For instance, one of the alleged victims was allegedly helped onto a bed four or five feet distant and there she was compelled to perform sex acts. The penalty is not less than three years in the state penitentiary for perversion nor more than 15 years in the state penitentiary, nor less than one year in the county jail. If these acts were committed, to be sure they cannot be condoned, but for moving this alleged victim four or five feet, "helping" her to the bed, he is to be executed. But for this movement, he would not have received the death penalty.

Another case is similar, but no rape was performed. In one instance it is alleged he threw the person to the floor, raped her and commited perversion. In this case he gets a prison term because he did not move her at all. In each of the other situations involving the death penalty, if the victim had not been moved a few feet, no death penalty would have been at all possible. As was said in the Dissenting Opinion, p. 22, Record, Folder III; Appendix A; p. 48, "Under the rule of this case a robber who shoves his victim against a wall is eligible for the gas chamber if a prosecutor arbitrarily chooses to ask for that penalty." Further the Opinion recites, "I conclude that the defendant is in effect, being condemned to death for de minimus acts."

This subject has recently been discussed in *Trop v. Dulles*, U. S. Sup. Ct. Rep. Volume 2, No. 10, 630, 642, 2 L. Ed. 2d 630, 642, where Mr. Chief Justice Warren had this to say:

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment and in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 S. Ct. 544, 19 Ann. Cas. 705. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

See also *State v. Ross,* 55 Ore. 450, 104 Pac. 596, for a discussion of the doctrine of unconstitutional excessiveness in punishment. Also *Ex parte Carlson,* 160 Cal 368, 383.

Mr. Justice Carter in his Dissenting Opinion has assembled a substantial array of cases denouncing cruel and inhuman punishment, to which we respectfully direct the Court's attention (50 A. C. 316, 344, 355-360) [Record, Folder III, Dissenting Opinion, pp. 9-15, 24-29] (Appendix A, p. 32 *et seq.*).

## VII.

**Section 209 of the Penal Code of the State of California Is Unconstitutional in That It Is so Indefinite and Uncertain as to Utterly Fail to Give Notice of What Is Charged or Condemned. It Violates Due Process in Violation of the Fourteenth Amendment to the Constitution of the United States.**

Section 209 of the Penal Code of the State of California is as follows:

> *Kidnapping for Blackmail or Robbery—Punishment.*—(1) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion (2) or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for

life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison, for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

No better argument can be made than that advanced by Mr. Justice Carter in his dissenting opinion, *People v. Wein, supra,* 50 A. C. No. 9, p. 316, at pages 352-354 [Record, Folder III, Dissenting Opinion, pp. 16-19; Appendix A, pp. 44 *et seq.*]:

"THE PHRASE 'CARRIES AWAY' IS AMBIGUOUS.

"Even if defendant did not 'kidnap' his victims, he would still be guilty of violating section 209 if he 'carried away' any one of them. We must therefore scrutinize the phrase 'carries away' in section 209.

"If we were to say that to 'carry away' meant no more than to cause a victim to move one foot we should necessarily include the more rigidly defined term 'kidnap,' since any act constituting 'kidapping' would also constitute 'carrying away.' This would make 'kidnaps' redundant in section 209. 'To carry away' must therefore differ from 'to kidnap' in some way other than in the distance required to consummate the crime. But the statutes and cases of California establish no clue as to the acts which deserve this label. The brief of the attorney general does not attempt to assist us.

"Penal Code, section 7, subdivision 16, states: 'Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning. . . .'

"Webster's Unabridged Dictionary defines 'carry away' thusly: 'a To remove from life [refers to death; . . . c To take possession of the mind; to move, sway, or charm; to delude; as, to be *carried away* by music, or by temptation . . . d To succeed in obtaining; to be victorious in or over; to win; also, *Obs.*, with *it*, to gain the victory; carry the day.'

"These definitions do not fit the factual context of the instant case, nor do they appear to have any meaning relative to any forced movement of a person.

"The word 'away' is defined thusly by Webster: '1. On the way; onward; along. 2. From a place; hence; thence;—of motion; as, go *away*; . . . 4. a From contact or close association; aside; off . . . 5. From one's possession;—with a sense of parting or loss; as, to give one's heart *away*. . . .'

"Meaning 2. of away, 'From a place' may be relevant. Still, the term 'place' is unclear since it may be used in such contexts as 'To move away from the window,' or 'to move away from home.' Its meaning as to distance is entirely contextual. To give it a meaning outside a context, as the Legislature has attempted to do, is meaningless. 'Away' begs us to answer the query 'from what?'

"Blackstone says that larceny required a 'carrying away.' (Jones, *Blackstone*, p. 2440.) This element was satisfied by the slightest movement of the item

to be taken. The essence of this common law crime was disturbance of possession and the movement of the property had to be accompanied by an intent to terminate the possession permanently. To rip a phrase from a finely woven context would make a crude patchwork of the statute. The disturbance of possession of personalty bears little resemblance to the deprivation of human freedom. They are different social menaces and terms used to describe them necessarily find themselves in dissimilar contexts playing semantical tricks on the unwary. I conclude that the technical meaning of 'carries away' is relevant only to the context of personal property law and has no commonly recognized technical application to the realm of crimes against liberty.

"The vernacular usage of the term may provide help. Suppose one says, 'X carried Y away.' What image arises in the mind of the hearer: Certainly not a picture of X forcing Y to move about a few feet in his own home. Or suppose one wished to describe X's forcing Y to move from one room to another. Many descriptive words and phrases come to mind before 'X carried Y away.' For example, 'X forced Y to move against his will.' The word 'away' just does not fit the facts. If the Legislature intended to include all forced movements within its definition of section 209 kidnapping for robbery, a simpler and clearer term would have been used. This is particularly true in view of the consternation raised by the decision in *People v. Knowles, supra*. The allusion to the command of Penal Code, section 4, is also pertinent here.

"It is apparent that the 1951 amendment was enacted to assuage the mischief of the Knowles holding. In this context, this intent should not be construed into oblivion. And it certainly does not pre-

mote justice to hold that the movement of a person four feet is an offense sufficient to warrant the death penalty when the statute is open to another less strict interpretation.

"I conclude that the phrase 'carries away,' as used in section 209, is undefined and meaningless; and that to hold that it encompasses defendant's acts is to misconstrue it violently."

The statute is too uncertain and ambiguous; it should be struck down.

See *In re Oliver*, 333 U. S. 276, 92 L. Ed. 682.

See also, *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed. 688, where the Court said:

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

## Conclusion.

Wherefore, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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*Attorney for Petitioner Wein.*

HENRY E. KAPPLER,
*Of Counsel.*

## APPENDIX A.

### Opinion of the District Court of Appeal.

[Crim. No. 6130. In Bank. May 27, 1958.]

The People, Respondent, v. Edward Simon Wein, Appellant.

Appeal (automatically taken under Pen. Code, §1239, subd. (b)) from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. LeRoy Dawson, Judge. Affirmed; motion to argument record, denied.

Prosecution for robbery, rape, sex perversion, kidnapping and kidnapping for purpose of robbery. Judgment of conviction of kidnapping for purpose of robbery imposing death penalty, and judgment of conviction of other offenses imposing imprisonment for terms prescribed by law, affirmed.

Russell E. Parsons and Henry E. Kappler for Appellant.

Louis Licht as Amicus Curiae on behalf of Appellant.

Edmund G. Brown, Attorney General, Elizabeth Miller, Ray R. Goldie and Joe Yasaki, Deputy Attorneys General, for Respondent.

SPENCE, *J.*—Defendant was charged by information with three counts of robbery (Pen. Code, § 211), six counts of rape (Pen. Code, § 261, subd. 3), six counts of sex perversion (Pen. Code, § 288a), two counts of kidnaping (Pen. Code, § 207), and five counts of kidnaping for the purpose of robbery (Pen. Code, § 209). Defendant initially entered pleas of not guilty and not guilty by reason of insanity, but he withdrew the latter plea prior to

trial. The jury found defendant guilty on all the counts charged in the information. They further found that in each count charging kidnaping for the purpose of robbery, the person named therein suffered bodily harm, and they fixed the penalty at death; and that in each count charging robbery, the crime was in the first degree. A motion for a new trial was denied. Defendant was sentenced to death on the five counts of kidnaping for the purpose of robbery done with bodily harm, and to the state prison for the term prescribed by law on each of the remaining counts, the last mentioned sentences to run consecutively. This appeal from the judgments of death comes before us automatically. (Pen. Code, § 1239, subd. (b).)

These convictions arose out of separate attacks on eight different women, which attacks occurred over a period of approximately 18 months. It would serve no useful purpose to relate all the sordid facts surrounding the commission of the several offenses. The evidence concerning the last incident will be set forth in some detail, as it typifies the general pattern which ran through most of the attacks with but slight variations.

On October 30, 1956, the last victim advertised some furniture for sale in several newspapers circulated in the Los Angeles vicinity, giving her telephone number but not her address. She occupied a lower apartment in a house located in the Hollywood hills. At about noon on October 31, 1956, she received a telephone call from a man in response to the advertisement, and she made an appointment for him to see the furniture that afternoon. The man arrived at about 2:30 p. m. and identified himself as the party who had called earlier that day. A friend of the victim was present at her apartment when he arrived. He

indicated that he was interested in beds and accompanied the victim into the bedroom to examine them. After seeing and discussing the furniture for 10 to 15 minutes, the man left, saying that he would either call or return after visiting another place. The victim drove her friend home at about 3:30 p. m. and returned to her apartment at about 3:45 p. m.

About five minutes after her return, the man reappeared at the aparement and said that he wanted to measure one of the beds to see if it would fit his living quarters. After measuring the bed, he stated that he would like to call his wife and have her view the furniture. With the victim's permission, he used her telephone, and after dialing a number and apparently getting no response, he hung up.

The man then looked at his watch and told the victim that he had lost his watch stem. She sympathized with 'm and got down on the floor in the small hall just outside the living room to help him look for it. Being unable to find the stem, she started to get up. The man, who was then behind her, put his arm around her waist and told her to say nothing. She felt something sharp in her back and discovered that it was a knife. He instructed her to lie down and then tied her hands with copper wire.

He then told the victim to find her billfold, and after helping her up, told her that he wanted only money and that he would not hurt her. She could not remember exactly where she had last placed her billfold. With his arms around her and the knife in her back, he forced her against her will and without consent to walk with him to a desk in the living room. This was a distance of approximately 20 to 25 feet. He opened the desk drawer but the billfold was not there. He told the victim

to crawl on her knees through the living room to the bedroom, a distance of about 50 feet, and she complied out of fear. She told him to look in the dresser drawers. He found the billfold, and placed it and the $17 or $18 it contained in his pocket.

The man then pushed the victim to the floor and said, "Now I have got the money, how about some sex?" He then removed the clothing from the lower portions of her body, exposed his private parts, and forced her to engage in an act of oral copulation (Pen. Code, § 288a) while he brandished a knife. Thereafter, and without her consent, he indulged in an act of sexual intercourse.

The telephone then rang and the occupants of the upstairs apartment started to walk around. The man said that he was going to leave. He made the victim lie on the floor on her stomach, tied her legs with her hose, and shoved her undergarments into her mouth. He then picked up a towel and ripped it, using the larger portion to wipe the floor, drawers and door knobs. He tied the other part of the towel around her mouth and covered her head with another towel. After he had left, she struggled and was able to free her hands and feet. She then summoned the police.

The seven other incidents reflect in varying degrees the same techniques and show a consistent pattern of operations used by the perpetrator of these crimes. In each case, either rentals of living quarters or sales of personal property had been advertised in the newspapers. In all but one, he gained entrance on the pretext that he was answering the advertisement. He would often use some ruse to survey the premises for other occupants, such as asking to wash his hands in the bathroom, viewing the items for

sale, or making a telephone call. In several instances, he left after finding some impediment to his scheme, later returning at a more opportune time. In some, he pretended to call his wife or girl friend to have her join in the selection. He feigned that he had dropped a watch stem in six cases and a watch crystal in another. He grabbed the victims from behind and threatened them with a knife. Their hands were tied with copper wire in several cases, and the legs were bound with their own stockings. In many ways, the methods that he employed in forcing the victims to part with their money and, in most instances, to submit to his lustful desires were strikingly similar. Of course, all the similarities did not appear in every case. The sexual molestations varied in degree and did not occur at all in one case. During one attack, the assailant and another man were present. Nevertheless, there can be little doubt that the same man committed all of the numerous crimes charged.

Defendant was connected with these offenses in several ways. Seven of the victims positively identified him as their assailant. The eighth said he looked like the same man. Beyond these identifications, there were four other phases of the evidence corroborating the victims. First, a man transacting business with one of the victims clearly identified defendant as the person who was with her the night before she was molested. Second, a car which defendant had borrowed from a friend was seen parked in the driveway of the residence of one of the victims by two witnesses who recognized the vehicle by the lettered part of the California license plate and the somewhat unique brand of tires on it. Third, defendant was identified as the man who answered an advertisement for the sale of a used kitchen range and who left a check in pay-

ment. A handwriting expert testified that defendant was the person who wrote the check. There was no attack involved in the last mentioned incident. Fourth, expert witnesses testified that a fragmentary fingerprint found on a water glass, used by the assailant at the home of one of the victims was the fingerprint of defendant.

Defendant denied that he had committed any of the offenses. Witnesses were called to testify to his good reputation. He also presented testimony indicating that he was at other locations during the time that three of the offenses had been committed.

*Conduct of Prosecuting Attorney During Voir Dire Examination*

Defendant contends that the deputy district attorney was overly zealous in questioning the prospective jurors. He primarily objects to the examination of the jurors about their opinions on capital punishment and to the discussion of their responsibility for imposing the death penalty if warranted by the facts of the case. However, a prosecutor in a case where the death penalty may be imposed clearly has the right to ascertain the views of the potential jurors (see People v. Hoyt, 20 Cal. 2d 306, 318 [125 P. 2d 29]; People v. Rollins, 179 Cal. 793, 795-796 [179 P. 209]) so that he can intelligently exercise his challenges against those whose consciences would preclude them from imposing this penalty. (See Pen. Code, § 1074, subd. 8; People v. Riser, 47 Cal. 2d 566, 573-576 [305 P. 2d 1].)

Defendant also deems portions of the prosecutor's explanation of the law applicable to the case to have been prejudicial. However, the prosecutor properly used such explanation as a basis for hypothetical questions to de-

termine whether the jurors would follow the instructions of the court (Kramm v. Stockton Electric R.R. Co., 22 Cal. App. 737, 746-747 [136 P. 523]) and to ascertain their state of mind on the issues to be presented. (People v. Knight, 44 Cal. App. 2d 887, 891-893 [113 P. 2d 226].)

Defendant challenges the prosecutor's remarks, to the effect that he represented all of the people of this state and not just the victims or police, as being calculated to impress the jurors with the importance of his position and to cause them to give undue weight to his actions. However, it was entirely proper for this public officer to inform the panel of his functions. In effect, he did little more than to state general theories underlying criminal prosecutions. In any event, since defendant failed to object to any of the alleged improper conduct during the deputy district attorney's examination of the veniremen, he cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been corrected by proper instructions. (People v. Brice, [1]49 Cal. 2d 434, 437 [317 P. 2d 961]; People v. Guasti, 110 Cal. App. 2d 456, 465 [243 P. 2d 59].)

*Conduct of Prosecuting Attorney During Arguments*

Defendant raises numerous objections to the deputy district attorney's arguments to the jury and states that the alleged misconduct denied him a fair trial as guaranteed by both the state and federal Constitutions. He claims that the jurors were "whipped" into their recommendation of the death penalty. This, in his view, was apparently produced by the prosecutor calling the jurors by their names,

[1]Advance Report Citation: 49 A. C. 436, 439.

by taking them to task, and by using epithets. However, his conclusions entirely overstate the actual situation. It is true (1) that the deputy district attorney did refer to one or more jurors by name on three separate occasions; (2) that he did vigorously urge the jury throughout his arguments to impose the death penalty; and (3) that he did use "epithets" when he referred to defendant as being among that "strange breed" of "kidnapers, robbers and forcible rapists." With respect to the first point, while arguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved, it does not follow that such conduct is necessarily prejudicial in any given case. With respect to the second point, while the accused is entitled to a fair trial, the prosecutor may properly urge his points vigorously as long as he does not act unfairly; and therefore he may vigorously urge the jury to convict and to impose the death penalty in the light of the evidence. (People v. Harris, 219 Cal. 727, 732-733 [28 P. 2d 906].) And with respect to the third point, the prosecutor may use appropriate epithets which are warranted by the evidence without being chargeable with prejudicial misconduct. (People v. Carr, 113 Cal. App. 2d 783, 788 [248 P. 2d 977]; People v. Hunter, 49 Cal. App. 2d 243, 250-251 [121 P. 2d 529]; People v. Burnette, 39 Cal. App. 2d 215, 230 [102 P. 2d 799].) In any event, no objection was made in the trial court to any of the above conduct or to certain other matters of which defendant now complains, and no instructions were asked with respect thereto. We have consistently rejected such claims when the point is raised for the first time on appeal. (People v. Hampton, 47 Cal. 2d 239, 240-241 [302 P. 2d 300]; People v. Byrd, 42 Cal. 2d 200, 208 [266

P. 2d 505].) Furthermore, this is not a case where any possible harmful effect of the comments could not have been obviated by a timely admonition to the jury (see People v. Kirkes, 39 Cal. 2d 719, 726-727 [249 P. 2d 1]) or where the evidence was so closely balanced, presenting grave doubt as to defendant's guilt, that the prosecutor's argument materially affected the outcome. (People v. Fleming, 166 Cal. 357, 381 [136 P. 291, Ann. Cas. 1915B 881].)

There was one instance during the prosecutor's argument, however, where he may have strayed beyond the bounds of permissible argument and where a prompt objection was made by defendant's counsel. The prosecutor said, in part, "Why, this fellow puts Caryl Chessman to shame. He makes a rank amateur out of Caryl Chessman." At this point, the defense counsel cited this as prejudicial misconduct and requested that the jury be instructed to disregard it. The prosecutor then asserted his right under People v. Kynette, 15 Cal. 2d 731 [104 P. 2d 794], to proceed along these lines and the court permitted him to do so. He then contrasted Chessman's attacks from an automobile disguished as a police vehicle operating in the relative open of the public streets with defendant's assaults in the victims' homes. He then said, "Chessman, too, had ice water in his veins. That little girl [the 14-year-old victim in this case] . . . will carry a mark on her forever. She may end up the same way Mary Alice Meza, the 17-year-old virgin, the victim of the Chessman attack, in a mental institution unless she has a strong mind and can in some way through her religious thinking beat it." He then concluded that the death penalty was deserved because the defendant displayed the ". . . behavior pattern of a cold cruel individual with ice water in his veins."

The People attempt to justify the quoted argument, as did the prosecutor at the trial, by referring to People v. Kynette, *supra*. There it was said: "Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents. He may refer to matters of common knowledge, not special to the case, and to well known historical incidents." (15 Cal. 2d 731, 757.) It appears, however, that the comments here were more similar to those criticized in People v. Jackson, 44 Cal. 2d 511 [282 P. 2d 898]. There the prosecutor in a kidnaping case referred to the Greenlease, Hart, and Lindbergh cases, and compared the ultimate fate of the victims. (44 Cal. 2d 511, 520.) But even assuming that the prosecutor here went beyond the bounds of legitimate argument in his comparison of this case with the Chessman case, it does not follow that a reversal is required. It was not claimed on the trial or on this appeal that the perpetrator of the several offenses should have had imposed upon him any punishment less than that which the jury imposed. Defendant's sole claim was that he was not the perpetrator. We have reviewed the record, and such review convinces us that the evidence of defendant's guilt was so strong that there is no reasonable probability that any result more favorable to defendant would have been reached in the absence of the claimed misconduct. Under such circumstances, the claimed misconduct does not constitute ground for a reversal. (People v. Watson, 46 Cal. 2d 818, 837-838 [299 P. 2d 243].)

*Argument of Prosecuting Attorney as to Meaning of Life Imprisonment without Possibility of Parole and Legislative Abolition of Death Penalty*

Defendant asserts that it was prejudicial error for the deputy district attorney to have stated both in his *voir dire* examination of the jury and his closing argument that a sentence of life imprisonment without possibility of parole would not necessarily mean that defendant would remain in prison for the remainder of his life. He pointed out that any such sentence could be commuted by the Governor, that a pardon could be granted by the Governor, or that the Legislature might enact a law changing the sentence. In People v. Chessman, 38 Cal. 2d 166, 189-190 [238 P. 2d 1001], the identical remarks, both in the argument by the prosecutor and the explanatory instructions by the court, were sanctioned insofar as they were addressed to the discretion of the jury in specifying the punishment for kidnaping for the purpose of robbery where the victim suffered bodily harm. (See also People v. Reese, 47 Cal. 2d 112, 116-117 [301 P. 2d 582]; People v. Jensen, 43 Cal. 2d 572, 580-581 [275 P. 2d 25]; People v. Byrd, *supra*, 42 Cal. 2d 200, 206-208.) When the deputy district attorney's remarks are read in full, it is quite apparent that they could only have been taken by the jurors as factors to be considered in assessing the penalty. The case of People v. Morlock, 46 Cal. 2d 141, 147-148 [292 P. 2d 897], relied upon by defendant, is clearly distinguishable. There, the prosecutor erroneously stated that a person sentenced to life imprisonment was eligible for parole *within* seven years rather than after having served seven years. Equally unavailing is People v. Caetano, 29 Cal. 2d 616, 619-620 [177 P. 2d 1], since the only comments there held improper were to

the effect that paroles might be granted without regard to merit in order to provide space for incoming prisoners.

Defendant also maintains that the deputy district attorney's reference to the Legislature's consideration of a bill proposing a moratorium on the death penalty may have harmed him by leading the jurors to believe that he would benefit from such a suspension. However, the deputy district attorney made it abundantly clear that he did not believe that any such moratorium would be adopted. He merely used this to show how changes in penalties could be sought in amplication of his remarks on the uncertainties of a sentence to life imprisonment without parole.

*Sufficiency of Evidence*

Defendant argues that there was ample evidence to have supported a verdict of acquittal, and he buttresses this conclusion by marshaling those facts which tend to show his innocence. He then characterizes parts of the People's expert testimony as "highly suspect". From this, he expresses the belief that the jury might well have accepted his alibi except for the "grossly prejudicial" conduct of the prosecutor. Insofar as this again raises the question of prejudice from the prosecutor's actions, this has been fully considered. Insofar as it challenges the sufficiency of the evidence, defendant is merely asking us to reweigh the evidence. This is clearly not our function as an appellate court. (See People v. Daugherty, 40 Cal. 2d 876, 885 [256 P. 2d 911]; People v. Headlee, 18 Cal. 2d 266, 267 [115 P. 2d 427]; People v. Newland, 15 Cal. 2d 678, 681 [104 P. 2d 778]; People v. Tedesco, 1 Cal. 2d 211, 219 [34 P. 2d 467].) Further, even though there might have been sufficient evidence to sustain a

finding of not guilty, this in no way shows that the verdict of guilty was without abundant evidentiary support.

Finally, defendant attempts to show that some of the evidence was so highly improbable as to be incredible and to thus allow an appellate court to set aside the conviction. (See People v. Headlee, *supra*, 18 Cal. 2d 266.) He says that, as a small man with an injured back, he would have been unable to seize a woman, tie her, and then rape her. The jury only had defendant's own testimony as to the condition of his back, but they did have a full view of his stature and the relative stature of the victims. It was within their province to reject his statements, as they apparently chose to do. They evidently believed the testimony of the various women whom he had abused. The conflict in the evidence was resolved by the triers of fact. There is nothing in the record to establish that it was physically impossible for defendant to have performed the acts ascribed to him, or to compel us to declare that the numerous victims' testimony was inherently improbable. (People v. Houston, 21 Cal. 2d 690, 693 [134 P. 2d 758]; People v. Wilder, 151 Cal. App. 2d 698, 704-705 [312 P. 2d 425].)

*Extent of Movement Required to Establish Kidnaping Under Penal Code, Section 209*

Defendant urges that the Legislature in enacting section 209 of the Penal Code, which permits the imposition of the death penalty against "any person . . . who kidnaps or carries away any individual to commit robbery" if the victim suffers bodily harm, intended that the movement be over a substantial distance and not merely between the rooms in a dwelling. He expressly asks this

court to reconsider the position it took in People v. Chessman, *supra*, 38 Cal. 2d 166, 190-193. There we said, "The fact that Regina in being kidnaped or carried away was forced to move only 22 feet does not make her abduction any the less kidnaping within the meaning of the statute. She was taken from the car of her chosen escort, and from his company, to the car of defendant and into the latter's company and there detained as a virtual prisoner and forced to submit to his demands. It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state." (38 Cal. 2d 166, 192.) We there reviewed the California cases and those from other jurisdictions where kidnapings were held to exist although the asportations were not great. Here, the testimony of some of the victims fixed the amounts of movement at distances ranging from a few feet up to more than 50 feet. Under the reasoning and language of the Chessman case, any of these distances sufficed for a conviction under the challenged section. This conduct went beyond a mere detention during the course of an armed robbery, which is no longer punishable by death. (See People v. Taylor, 135 Cal. App. 2d 201 [286 P. 2d 952].) To the extent that defendant's argument is predicated on legislative intent, it must be noted that the Legislature has been in session several times since the Chessman case was decided, and it has not seen fit to amend the kidnaping law to limit the rule we announced. If the section, as interpreted by this court, is regarded as too harsh, the remedy is for the Legislature to redefine kidnaping, and not for this court to engraft some uncertain distance limitation onto the plain language of the section. (See People v. Knowles, 35 Cal. 2d 175, 180-183 [217 P. 2d 1].)

*Constitutionality of Penal Code, Section 209*

Defendant asks that we declare section 209 unconstitutional because the language, "who kidnaps or carries away," is uncertain. This indefiniteness is supposed to be apparent from the decisions of this and other California courts. However, defendant fails to cite the decisions which he believes produce this effect. Rather, it would seem that the previously quoted language from the Chessman case clearly indicates the broad sweep of this section.

While defendant concededly had a right to fair notice as to what acts were prohibited (see *In re* Peppers, 189 Cal. 682 [209 P. 896]; People v. Neff, 117 Cal. App. 2d 772, 780-781 [257 P. 2d 47]), it appears that the questioned statute contained terms well enough known to enable defendant and others to understand their import. (See Lorenson v. Superior Court, 35 Cal. 2d 49, 59-61 [216 P. 2d 859]; People v. Deibert, 117 Cal. App. 2d 410, 417-420 [256 P. 2d 355]; People v. Darby, 114 Cal. App. 2d 412, 427-428 [250 P. 2d 743].) The statute did not have to include "detailed plans and specifications" of the proscribed conduct. (Lorenson v. Superior Court, *supra*, 35 Cal. 2d 49, 60.)

*Admissibility of Accusatory Statements*

Defendant claims that the trial court erred in admitting certain statements and by treating his reactions to them as adoptive admissions. One of the victims testified that after she had seen defendant in a line-up in jail, she was asked by the police to confront him. When she later met him in a small room, she remarked, "Well, I'm glad they caught you, kid." Defendant made no reply. The other incident occurred when a witness, who had seen defendant at the home of one of the victims prior to an attack, later

asked defendant several questions at the behest of the investigating police officers. Defendant cast his eyes toward the floor and said that he would not answer any questions unless he had an attorney present. Defendant contends that these incidents could not possibly be construed as any type of admission, and that the error in admitting them was compounded by the deputy district attorney's comments and the court's instructions.

While the testimony concerning the first incident involving the remarks of a victim was correctly admitted in order to permit the jurors to evaluate its accusatory nature and the weight to be accorded to defendant's failure to make any reply (see People v. Smith, 111 Cal. App. 579, 580-581 [295 P. 682]), the second one, where defendant remained silent on the asserted ground that he would not speak unless he had an attorney present, might well have been excluded if objection had been made. (See People v. Abbott, 47 Cal. 2d 362, 373 [303 P. 2d 730]; People v. McGee, 31 Cal. 2d 229, 238-240 [187 P. 2d 706].) However, defendant's objection to this line of testimony is made for the first time on this appeal. Such belated attempts to obtain reversals have been held ineffective in regard to testimony relating to alleged admissions. (People v. Guarino, 132 Cal. App. 2d 554, 559 [282 P. 2d 538]; People v. Cummings, 7 Cal. App. 2d 406, 407 [46 P. 2d 778]) and in regard to admitting hearsay evidence (People v. Wade, 138 Cal. App. 2d 531, 533 [292 P. 2d 303]; People v. Murray, 135 Cal. App. 2d 600, 602 [287 P. 2d 775]). The rule should apply with equal force to testimony relating to alleged adoptive admissions. Also, defendant cannot make, as he attempts here, his first attack on the arguments of the deputy district attorney with regard to admissions on appeal, when any error

could have been obviated at the trial. (See People v. Brice, *supra*, [1]49 Cal. 2d 434, 437; People v. Hampton, *supra*, 47 Cal. 2d 239, 240-241 [302 P. 2d 300].) Moreover, the giving of instructions on the definition of an admission, the effect of silence or a false or evasive reply, and the possibility of falsehoods indicating consciousness of guilt (see Cal. Jury Instrns., Crim. (1946 and Supp. 1953) Nos. 29, 29-D, 30, 30-A) was not error since the evidence introduced without objection could be considered by the jury. (See People v. Wade, *supra*, 138 Cal. App. 2d 531, 533; People v. Murray, *supra*, 135 Cal. App. 2d 600, 603.) Further, although not raised by the deputy district attorney before the jury, there were other incidents in the record, admitted without objection, which fell within these instructions. When the last victim saw defendant in a public place and had him detained, she said, "This is the man that raped and kidnaped me." Defendant made what might well be considered an equivocal answer to the direct accusation when he replied, "That gal is drunk." Also, defendant's testimony placing him at another location during one of the attacks was directly contradicted by his own statements made to the investigating police officers shortly after the arrest. The jury could have considered the latter statement as a false or contradictory statement showing consciousness of guilt.

*Instructions*

Defendant assails certain instructions given to the jury and challenges the trial court's refusal to utilize some of the instructions offered by him. First, he complains that the standard instruction on consciousness of guilt and falsehood (Cal. Jury Instrns., Crim. (1946) No. 30-A)

[1]Advance Report Citation: 49 A. C. 436, 439.

should not have been read because part of it pertains to situations where a defendant has "endeavored to procure false or fabricated evidence to be produced at the trial." Defendant's witnesses testified that he had spent the day of October 31, 1956, being the date of the last attack, at his sister's home. On the other hand, defendant had been positively identified by the victim in her testimony as the person who committed the offenses in her home on that date. Furthermore, defendant had told the police following his arrest that he had been at specified places, other than his sister's home, on the date in question. The jury could properly infer from this evidence that defendant had, in fact, procured false and fabricated alibi evidence with respect to October 31, 1956. There was therefore no error in giving the challenged instruction.

Second, defendant maintains that while the standard instruction to the effect that neither the prosecution nor defense is required to produce all available evidence (Cal. Jury Instrns., Crim. (1946) No. 23) correctly states the law gene ally, this case comes within a recognized exception. De endant relies on People v. Beal, 116 Cal. App. 2d 475, 479 [254 P. 2d 100], where the court in a case involving the rape of a 13-year-old girl stated that, since the prosecution failed to produce the examining physician as a witness, it was to be "presumed that his testimony would not be corroborative of that given by the complaining witness." Here, defendant points out that the brothers and sisters of the 14-year-old victim, who were in the house when defendant arrived but were not present when the criminal acts were perpetrated, and the escort of the last victim, who was with her when she encountered defendant in a public place and had him apprehended, were not called to testify. However, the Beal case is readily

distinguishable. There, the testimony would have been highly material. The rape victim was examined by a physician the morning after the attack but the physician was not offered as a witness. Here, the witnesses could not have testified to any ultimate issues or essential elements of the crimes charged. Further, the reversal in the Beal case did not turn directly on the failure to call the physician. The court found that certain statements of the prosecuting attorney were highly improper. To show how this misconduct was prejudicial, the court looked to the even balance of the evidence. It was in this context that it stated the presumption. (116 Cal. App. 2d 475, 477-479.) Instead, People v. Tuthill, 31 Cal. 2d 92, 102 [187 P. 2d 16], would seem to be controlling. There we said, "There is no compulsion on the prosecution to call any particular witness . . . so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial." (31 Cal. 2d 92, 98.) This rule applies to the instant case, and shows that there was no error in giving the challenged instructions, which substantially reiterated the rule announced in the Tuthill case.

Third, defendant contends that by using the standard instruction on contradictory statements with its clause applicable when a defendant is a witness (Cal. Jury Instrns., Crim. (1946 and Supp. 1953) No. 54-A-alternate), the court unduly emphasized any contradictions made by defendant. He says that a general instruction should have been given pertaining to all witnesses, since one of the victims made conflicting statements about her assailant's height. However, defendant fails to correctly analyze the alternate standard instruction. The first clause is identical to the instruction to be given when the defendant

has not contradicted himself. (Cal. Jury Instrns., Crim., *supra*, No. 54-A.) The only difference is in the last sentence of the alternate instruction, which correctly states that a defendant's own contradictory statements can be used beyond impeachment to show the truth of such statements. (See People v. Southack, 39 Cal. 2d 578, 585 [248 P. 2d 12].) This alternate instruction covers contradictions by all witnesses and does not place too great emphasis on defendant's own statements. The court properly refused defendant's own more general instruction, since the applicable law had been fully covered. (People v. Steccone, 36 Cal. 2d 234, 240 [223 P. 2d 17]; People v. Eggers, 30 Cal. 2d 676, 688 [185 P. 2d 1].)

Fourth, defendant interposes several objections to instructions on what the jurors could consider in fixing the penalties. He attempts to show uncertainty between two paragraphs of one instruction because the second did not repeat the number of the counts of the information in discussing them the second time. However, this could not have created any confusion in the minds of the jurors because the character of the offenses discussed in the second paragraph was clearly mentioned and the various counts had been fully explained in one of the preceding instructions.

Defendant also tries to show a conflict between two portions of the instructions which he believes could have only led to misunderstanding on the part of the jurors. He initially refers to the paragraph telling the jury not to consider the possible penalties on those counts other than kidnaping for the purpose of robbery with bodily harm. He then contrasts a small fragment of another instruction telling the jurors, ". . . it is your duty to conscientiously consider all the evidence in the case in

arriving at your decision as to the penalty to be fixed by you in this case." However, defendant has taken the latter quotation out of the context of the instruction given by the court on the penalty for kidnaping for the purpose of robbery where bodily harm has been suffered by the victim. It correctly and clearly placed in the jury's absolute discretion the imposition of either the death penalty or confinement for life without possibility of parole (Pen. Code, § 209) and permitted the jury to take all the evidence into consideration on this inquiry alone. These full instructions could not have confused the jury.

Defendant also asserts that the jury had no right to use all of the evidence in choosing between the two penalties. He says that it had to set the penalty by referring only to the evidence introduced on the particular count. He cites no authority for this proposition. Section 209, in committing this determination to the discretion of the jury, sets no limits. Rather, the language used in the instructions here seems entirely proper in the light of our decision in People v. Brust, 47 Cal. 2d 776 [306 P. 2d 480]. In affirming the death penalty for multiple murders, we there held that the jurors had been correctly instructed and that they were to select the penalty on the basis of ". . . a thorough consideration of all the evidence. . . ." (People v. Brust, *supra*, p. 789; see also People v. Friend, 47 Cal. 2d 749, 767-768 [306 P. 2d 463].) Also, defendant claims that the following portion of the instruction about the penalty under section 209 was meaningless: "Insofar as selecting the penalty is concerned the law does not itself prescribe, nor authorize the court to innovate any rule circumscribing the exercise of your discretion, but, rather commits the whole matter of its exercise to your judgment and conscience." This portion of the in-

struction was neither meaningless nor incorrect. (See People v. Friend, supra, 47 Cal. 2d 749, 767.) It was but another way of telling the jurors that they were charged with the final determination of the penalty, and that they were to act within their own uncircumscribed discretion.

Fifth, defendant objects to the instruction covering the manner in which the jury was to proceed in its deliberations on those counts charging kidnaping for the purpose of robbery. He extracts two phrases and says that they were a misstatement of the law. However, the court was correct in telling the jury that they could consider the evidence and the possible consequences of the two penalties in determining the punishment defendant should receive. (See People v. Brust, *supra*, 47 Cal. 2d 776, 789-790, n. 4; People v. Friend, *supra*, 47 Cal. 2d 749, 767, 768.) The instruction as a whole presented an accurate summation of the process to be used in fixing the penalty for the violations of section 209.

Sixth, defendant contends that the instructions on the elements necessary to constitute a violation of section 209 were improper. However, the instructions were correctly based upon the statute and the rules enunciated in People v. Chessman, *supra*, 38 Cal. 2d 166, 192. Also, defendant says that there was a mere detention involved here, and that the instructions on kidnaping under section 209 were inapplicable. However, there was far more than a mere detention here as hereinabove indicated.

Seventh, defendant urges that the court erred in failing to give a cautionary instruction to the effect that, in prosecutions for sex offenses, accusations are easily made and difficult to disprove, and that the testimony of the prosecuting witnesses should be carefully examined. Even if

such an instruction is not requested, as here, it is incumbent upon the court to give one on its own motion. (People v. Nye, 38 Cal. 2d 34, 40 [237 P. 2d 1]; People v. Willis, 129 Cal. App. 2d 330, 336 [276 P. 2d 853].) However, it is not always prejudicial error for the court to fail to give the instruction, since the circumstances of each case are the determinative factor. (People v. Nye, *supra*, p. 40; People v. Willis, *supra*, p. 337.) Here, seven of the eight prosecuting witnesses testified with a high degree of certainty as to defendant's identification and criminal acts. Their testimony revealed a set pattern in which their assailant operated. To this extent their stories were mutually corroborative. On the whole, their narrations were completely consistent in all important respects. The only possible discrepancy that defendant is able to show was where the 14-year-old victim was uncertain of defendant's height. Further, other substantial evidence connected defendant with the crimes. As was said in People v. Nye, *supra*, page 41: "A careful examination of the entire record in accord with article VI, section 4½ of the California Constitution, leads us to the conclusion that it is improbable that the jury would have rejected the testimony of the prosecuting witnesses had a cautionary instruction been given and that there has therefore been no miscarriage of justice requiring reversal of the judgment."

*Admission of Evidence on Rebuttal*

Defendant makes two objections to evidence presented by the prosecution on rebuttal. First, he claims that a woman witness, who was not attacked, should not have been allowed to testify that defendant answered her newspaper advertisement offering an electric range for sale. She identified a check as having been given to her by de-

fendant under an assumed name. Later, a handwriting expert expressed his opinion that the check was written by defendant. This chain of evidence was produced on rebuttal after defendant had denied on cross-examination all the essential facts of the incident. The practice of allowing the district attorney or his aides to withhold a part of their case in chief and to offer it after the defense has closed has been condemned in People v. Carter, 48 Cal. 2d 737, 753-754 [312 P. 2d 665], and People v. Rodriquez, 58 Cal. App. 2d 415, 418-419 [136 P. 2d 626]. But here the testimony was clearly introduced primarily for purposes of impeachment of defendant in his denial on cross-examination of an incident not charged in the information. In any event, no objection was made to the introduction of this evidence. Further, the order of proof rests largely in the sound discretion of the trial court. (Pen. Code, §§ 1093, subd. 4, 1094; People v. Byrd, *supra*, 42 Cal. 2d 200, 211-212; People v. Avery, 35 Cal. 2d 487, 491 [218 P. 2d 527].) Where, as here, the desirability of admitting the testimony at the questioned point may be debatable, no abuse of discretion on the part of the trial court should be found when that court has not had the point brought to its attention. (See People v. Carter, *supra*, 48 Cal. 2d 737, 754.)

Second, defendant claims that the expert testimony that defendant's fingerprint was found on a glass at the home of one of the victims should not have been received on rebuttal. The prosecution had this information two days prior to the close of its case in chief. Again we come to the question whether the district attorney or his aides indulged in a proscribed withholding of matter properly belonging in their case in chief. (People v. Carter, *supra*, 48 Cal. 2d 737, 753-754; People v. Rodriquez, *supra*, 58

Cal. App. 2d 415, 418-419.) An affirmative answer seems possible. However, under the facts of this case, a reversal is not warranted. To the extent that defendant may have been unfairly surprised, this was obviated by the granting of his request for additional time to meet this testimony. The fingerprint was probably not unduly magnified in significance, since it merely corroborated the direct testimony of one of the victims. It was not as crucial as the defendant's confession withheld in People v. Rodriquez, *supra*, or the defendant's apparel found near where the murder weapon was abandoned and withheld in People v. Carter, *supra*, a case resting entirely on circumstantial evidence. In short, it cannot be said that any claimed error in admitting this testimony on rebuttal warrants a reversal. (See People v. Byrd, *supra*, 42 Cal. 2d 200, 212; People v. Avery, *supra*, 35 Cal. 2d 487, 491.)

*Constitutionality of Sections 1016 and 1026 of the Penal Code Providing for Bifurcated Trials on Issue of Insanity*

At the inception of the trial, the deputy district attorney, while in chambers with trial judge, the defendant, and defendant's counsel, announced his intention to question the prospective jurors on their attitudes toward pleas of not guilty by reason of insanity. Defendant claimed the right to have a separate panel try the insanity issue and urged that defendant would be prejudiced by such *voir dire* examination. The trial court said that this was the only time that the jury could be so interrogated. Defendant then withdrew his plea of not guilty by reason of insanity. Defendant contends that he was forced to make this election because the jury, if so questioned, could only have gained the impression that he was guilty. He sees a denial of due process and of a fair trial because a defen-

dant is required, in the discretion of the court, to submit the issue of insanity to the same jury which passed on the question of guilt (Pen. Code, §§ 1016, 1026) and which might not be impartial.

However, it has long been held that the proper time for the examination of the prospective jurors on the issue of insanity is during their selection at the beginning of the trial. (People v. Woods, 19 Cal. App. 2d 556, 558 [65 P. 2d 940]; People v. Foster, 3 Cal. App. 2d 35, 39 [39 P. 2d 271]; People v. Davis, 94 Cal. App. 192, 197 [270 P. 715].) With regard to his assertion that the same jury could not approach the insanity issue objectively, the following language employed by this court in People v. Leong Fook, 206 Cal. 64, 78 [273 P. 779], is significant: "We must assume that a fair and impartial jury of intelligent men and women would obey . . . . [their] instructions and would therefore hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination. We are not to assume that such a jury will cease to be fair and impartial as the cause progresses upon its successive issues, but, on the contrary, we must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality under the changed procedure as before until the whole cause . . . has been determined." This answers defendant's basic premise that he would not have received an impartial trial on the insanity issue. Also, the same reasoning equally refutes defendant's supposition that the jury could only believe that he admitted guilt by offering the plea of insanity. While these precise fair trial and due process arguments have apparently not been advanced before, it

is important to note that sections 1016 and 1026 of the Penal Code have long been held constitutional despite many similar objections. (See People v. Daugherty, *supra*, 40 Cal. 2d 876, 893, and the cases therein cited.)

Again we cannot say that the withdrawal of the insanity plea was "forced" upon defendant or that he was not sufficiently advised of the consequences of his decision. He was present in chambers when his attorney, the prosecutor, and the trial judge discussed the possible prejudicial effect of the challenged *voir dire* examination. In response to questions posed by his own counsel, he expressed his desire to withdraw his insanity plea and stated that he understood what had transpired. He was also informed that he could not reinstate the plea as a matter of right during the course of the trial. He might well have been additionally advised on other matters such as the non-binding effect of the reports of the court-appointed alienists, defendant's right to examine these experts and to produce his own witnesses to controvert their reports, and the jury's power to make an independent determination. However, defendant was represented by counsel who initially entered this plea over his client's objections. Surely, he must have explained to defendant the reasons for his actions. They must have weighed the probabilities of success on this defense in the light of the unanimous opinions of the three alienists to the effect that he was sane. Defendant and his counsel evidently decided that his cause would be better served by avoiding what they conceived to be the harmful effects of the proposed examination of the prospective jurors than by actually pursuing the insanity plea. This was a "free and voluntary" choice made by defendant with full advice of counsel. (See People v. Mendez, 27 Cal. 2d 20, 22 [161 P. 2d 929].)

*Double Punishment*

Defendant asserts that he suffered double punishment since he was sentenced for the kidnaping for the purpose of robbery and also for the robbery. However, it is not necessary to give extended consideration to this question. As we said in People v. Chessman, *supra*, 38 Cal. 2d 166, 193: "Defendant is correct in his contention that punishing him separately for the violations of section 209 of the Penal Code (kidnaping) and for the robberies and sex crimes which, under the circumstances here, are essential parts of those violations, would amount to double punishment, which is forbidden by section 654 of the Penal Code. [Citing cases.] However, since defendant is subject to two [here five] validly imposed death sentences, no purpose would be served by reversal of other judgments of conviction. [Citing cases.]"

*Adequacy of Defendant's Representation by Counsel*

The only entirely new point raised in the *amicus curiae* brief concerns the adequacy of the representation afforded defendant by the attorney whom he selected to conduct his defense in the trial court. Two aspects of his trial counsel's actions are specified as showing his lack of competence: His handling of the *voir dire* examination and his failure to object to some of the prosecutor's conduct. His courteous deportment toward the deputy district attorney is said to have prevented him from protecting defendant's rights. In handling the *voir dire* examination, he is said to have persistently emphasized that the prosecution's witnesses were all honest and positive in their

identifications, and that the burden of proof was cast upon defendant to show his innocence beyond a reasonable doubt. Actually, he primarily stated that his client acknowledged that the acts were perpetrated and only contended that he did not commit them. His remarks could not possibly have had the untoward impact upon the jury attributed to them.

But even if we concede that defendant's attorney may not have used the best of strategy in handling the *voir dire* examination and in failing to challenge some of the prosecutor's remarks, defendant still has not made that type of showing which alone would compel us to conclude that he was deprived of due process within the meaning of the constitutional guarantees. (U. S. Const., 14th Amend., § 1.) The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a "farce or a sham." (Lunce v. Overlade [7th Cir.], 244 F. 2d 108, 110; see also Taylor v. United States [9th Cir.] 238 F. 2d 409, 413-414, cert. denied, 353 U. S. 938 [77 S. Ct. 817, 1 L. Ed. 2d 761]; United States *ex rel.* Feeley v. Ragen [7th Cir.], 166 F. 2d 976, 980-981; Hendrickson v. Overlade [N. D. Ind.], 131 F. Supp. 561, 562-564.) The record in this case does not even remotely approach such a situation. Defendant's sole defense lay in his claim that his identification by the victims was incorrect. His counsel vigorously cross-examined the prosecution's witnesses to test their memories, and assiduously attempted to establish an alibi and to show defendant's good char-

acter. He at most committed what in retrosepect may be claimed to be mistakes in judgment by following certain strategy employed. Such mistakes, if any, do not constitute a denial of due process. (United States *ex rel.* Darcy v. Handy [3d Cir.], 203 F. 2d 407, 426, cert. denied sub nom. Maroney v. United States *ex rel.* Darcy, 346 U. S. 865 [74 S. Ct. 103, 98 L. Ed. 375].)

*Motion to Augment Record*

Defendant moves to augment the record pursuant to rule 12(a) of the Rules on Appeal by including a certified copy of the minutes of the municipal court before which the preliminary examination was conducted. That record is offered to show that defendant was not taken before the municipal court until nearly five days after his arrest. He claims that there was "unnecessary delay" (Pen. Code, § 849) and that his constitutional rights were thus violated, citing Mallory v. United States, 354 U. S. 449 [77 S. Ct. 1356, 1 L. Ed. 2d 1479]. However, rule 12(a) on which defendant relies, by its own terms, provides for augmentation only where the record was "offered at or used on the trial or hearing below and [was] on file in or lodged with the superior court." (Rules on Appeal, rule 12(a).) Here, defendant makes no showing that the minutes were ever used in the proceedings in the superior court or that they ever became a part of that court's records. (See Estate of Hobart, 82 Cal. App. 2d 502, 510 [187 P. 2d 105].) Further, it would serve no useful purpose to add the requested document to the record since defendant cannot claim for the first time on appeal, as he at-

tempts here, that he was not seasonably brought before a magistrate. (People v. Newell, 192 Cal. 659, 669 [221 P. 622]; People v. Tennyson, 127 Cal. App. 2d 243, 246 [273 P. 2d 593].) The motion must therefore be denied.

In conclusion, it should be stated that the voluminous record and briefs have been carefully examined because of the seriousness of the charges made against defendant and because of the nature of the penalty that has been imposed upon him. Such examination leads us to the conclusion that the evidence overwhelmingly showed that he was guilty of the long series of despicable crimes with which he was charged. We further conclude that defendant was accorded a fair trial, and that there were no errors or other irregularities in the proceedings which would warrant a reversal.

The motion to augment the record is denied. The judgments and the order denying a new trial are affirmed.

Gibson, C. J., Shenk, J., Traynor, J., Schauer, J., and McComb, J., concurred.

CARTER, *J.*—I dissent on four grounds:

(1) The majority has misconstrued the meaning of the word "kidnaps" as it is used in Penal Code, section 209;

(2) The term "carries away" is so ambiguous within the context of section 209 as to be meaningless;

(3) The misconduct of the prosecutor in his summation was prejudicial to defendant in the matter of the sentence determined by the jury;

(4) The majority has affirmed the infliction of a penalty so excessive in relation to the defendant's acts as to transgress the constitutional provision condemning punishments which are cruel or unusual. (Cal. Const., art. I, § 6.)

The jury found the defendant had done these acts:

(1) He seized M. M. and tied her hands behind her with wire. He held a knife in her back while she searched for her billfold. Then he ordered her to crawl through her house to the bedroom. There he robbed her of $17 or $18, raped her, and forced her to an act of fellation. He forced her to move altogether about 75 feet under duress.

(2) He seized L. S. and bound her hands with wire. He dragged her by the hair 3 or 4 feet into a bedroom, then threw her 2 or 3 feet onto the bed. He raped her, forced her to an act of fellation and cut her with his knife. He then dragged her into a second bedroom an unstated distance away and locked her in a closet. He stole $200 in cash and a $4,000 money order.

(3) He seized C. F. in her bedroom and bound her hands with wire. He asked her for her money. She said she had $10 in the kitchen but he did not look for it. He did not take the $1.00 he found in her billfold. Then, to quote the victim, ". . . he helped me up on the

bed." The distance was 4 or 5 feet. He then raped her and forced her into perversion.

(4) He seized L. B. in her bedroom and bound her hands with wire. He took valuable jewelry and $30 or $40 in cash. He forced her to walk back about 12 feet to a daybed, and, when she complained of discomfort, he told her to get up and pushed her 4½ or 5 feet to a chair. Then he raped her.

(5) He seized and bound the hands of U. H. in her living room. He said he was going to rob her and she said, "'Here is everything I have; go ahead and take it.'" She wore jewelry and her purse was on a sofa in the same room. But he took nothing. He pushed her to the floor 5 feet away in the center of the room and forced her into perversion.

For these acts defendant was convicted on three counts of first degree robbery (Pen. Code, § 211a), four counts of rape (Pen. Code, § 261, subd. 3), four counts of sex perversion (Pen. Code, § 228a), and five counts of kidnaping with intent to rob and causing bodily harm (Pen. Code, § 209).* The penalty for first degree robbery is not less than five years in the state prison; for rape it is

*"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

not less than three years in the state prison; for perversion it is not more than 15 years in state prison or not more than one year in the county jail. The judgment was for the term prescribed by law, the terms to run consecutively. The penalty for kidnaping with intent to rob where bodily harm is done to the victim is life imprisonment without the possibility of parole or death. The choice is discretionary with the jury. The jury decided that Wein should die.

The jury also found that defendant did these acts:

(6) He seized and bound K. S., aged 15, shoved her 2 feet into a bedroom, raped her and violated Penal Code, section 288a. Afterwards she walked 8 feet at his command.

(7) He seized and severely beat A. C. He moved her 13 feet into a closet and fled.

(8) He and an accomplice seized A. H. and "dragged her out onto the floor," a distance of about 3 feet. Defendant raped her and committed the perverse act.

For these acts defendant was convicted on two counts of rape, two counts of sex perversion, and two counts of kidnaping as defined by Penal Code, section 207.*

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"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole." (Pen. Code, § 209.)

*"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom for the purpose and with the intent to sell such person into slavery or

Assuming the jury was correct in its factual findings, the defendant is guilty of the most perverse and outrageous crimes and should be punished severely and with little mercy.

However, it is my conclusion that the defendant did not violate Penal Code, sections 209 or 207, and, assuming *arguendo* that he did, the penalty of death is excessive to the point of barbarity.

*There Was No Violation of Penal Code Sections 209 or 207*

Since 1901 there have been two kinds of kidnaping in California. Section 207 was enacted in 1872 and codified the common-law definition. The section originally required that the victim be carried across a county or state line to constitute kidnaping. In 1905 the Legislature inserted the words ". . . or into another part of the same county . . ." making it possible to kidnap a victim without crossing a county line. (Stats. 1905, chap. 493, p. 653.)

The Legislature enacted section 209 in 1901. It then provided: "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the

involuntary servitude, or otherwise to employe him for his own use, or to the use of another, without the free-will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping." (Pen. Code, § 207.)

state's prison for life, or any number of years not less than ten."

There was no use of the word "kidnaping" in the enacting legislation (Stats. 1901, chap. 83, p. 98, § 1). This section was not meant to redefine kidnaping. The word first appears in Deering's Penal Code, 1906 edition, in the heading of the section. The Legislation first referred to violations of section 209 as kidnaping in 1933 in the descriptive heading to an amendment to that section (Stats. 1933, chap. 685, p. 1757). These headings are not enacted into law. That amendment read: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by life imprisonment without possibility of parole in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm inflicted by such kidnapers; or by life imprisonment with possibility of parole in cases where there is no violence and upon the recommendation of the trial jury or in the discretion of the trial judge."

The verb "kidnaps" was included in the definition of the crime defined by section 209. It cannot be assumed the Legislature meant to define the section 209 crime by itself by using this word. The word must be construed to have a meaning apart from and narrower than the crime defined by section 209. There are two possibilities: (1) It meant common law kidnaping; or (2) it meant kidnaping as defined in section 207. Since the Legislature

had already rejected the common-law definition of kidnaping and redefined it, the clear implication is that the word "kidnaps" in section 209 means kidnaping as defined in section 207. This is the contention of the attorney general in his brief in this case.

Section 209 was interpreted from 1933 to 1951 to encompass the act of robbery (for example, People v. Knowles, 35 Cal. 2d 175 [217 P. 2d 1]; People v. Brown, 29 Cal. 2d 555 [176 P. 2d 929]). This permitted prosecutors to demand the death sentence successfully for second degree robbery in cases where accompanying crimes outraged the jury. In 1951, the Legislature amended section 209 to its present form. (Stats. 1951, chap. 1749, p. 4167.) (See Pen. Code, § 209, quoted on page 345 of this opinion.) The 1951 amendment declared that section 209 was violated to commit robbery only where the perpetrator "kidnaps or carries away" his victim. These facts point to the conclusion that defendant in this case is not guilty of violating section 209 unless he either kidnaped a victim as defined by section 207 or "carried her away."

*Kidnaping under section 207.* Before 1905 Penal Code, section 207, required the victim to be carried outside the county before there was a kidnaping. In *Ex parte* Keil, 85 Cal. 309 [24 P. 742], defendants forced two victims from their boat in San Pedro harbor and took them under duress to Santa Catalina Island. Defendants were held not guilty of kidnaping because both the island and San Pedro are in Los Angeles County. According to the code commissioner's notes cited in West's Annotated Penal Code, sections 1-260, page 622, the 1905 amendment was advisable because of the Keil decision. No other reason is advanced for the amendment than to remove the Keil

aberration. This history of section 207 implies that the Legislature was still contemplating kidnaping in terms of movements over considerable distances. The words themselves clearly imply this. If the amendment were intended to include movements of three feet the Legislature would have amended the section by using words designating such minute movements. This is what it did in 1933 when it added such words as "seize" and "confine" to section 209. Significantly, it did not alter the section 207 definition of kidnaping at the 1933 session. It meant only to make more inclusive the false imprisonment of persons for extortion, ransom, and robbery; and therefore amended section 209 only. It is also significant that when the Legislature amended section 207 in 1905 it did not alter or abolish section 236 which defines the crime of false imprisonment as "the unlawful violation of the personal liberty of another." It appears that section 236 was aimed to punish violations of liberty not gross enough to be described as a carrying into another part of the same county.

Almost all of the California cases which review convictions under section 207 concerned asportations over considerable distances, usually many miles. All of them involved greater distances than are represented by the kidnaping of which Wein was convicted. None of them involved asportations entirely within one enclosed place. In all of them the asportation was from a place where the intended ancillary crime was difficult of consummation to a place where it was more easily done. This was not so in Wein.

Three cases affirmed convictions under section 207 in which the asportation was not great. In none of them was the issue of distance discussed by the court. All of

them were decided after People v. Tanner, 3 Cal. 2d 279 [44 P. 2d 324], which associated the term "kidnaping" with the short-haul abduction in that case. Tanner was convicted under section 209.

In People v. Hunter, 49 Cal. App. 2d 243 [121 P. 2d 529] (1942), defendant dragged one victim 60 yards and another across a railroad track to a pile of ties to rape them. In People v. Cook, 18 Cal. App. 2d 625 [64 P. 2d 449] (1937), defendant grabbed his victim as she walked in front of his house and dragged her inside to rape her. In People v. Thompson, 133 Cal. App. 2d 4 [284 P. 2d 39] (1955), defendants forced their victim into their car and drove him about one and one-half blocks to rob him. The court relied on People v. Chessman, 38 Cal. 2d 166 [238 P. 2d 1001], for this holding.

A consideration of People v. Tanner, *supra*, 3 Cal. 2d 279, and People v. Knowles, *supra*, 35 Cal. 2d 175, is important at this point. Both were decided on the basis of the 1933 amendment to section 209. In Tanner, defendants seized several members of a household and forced them to move about the house for some hours. In Knowles, defendants forced two store clerks to walk to a storeroom and one of them to return to the front of the store, then return to the rear. An examination of the language in these cases reveals that neither Mr. Justice Seawell in Tanner nor Mr. Justice Traynor in Knowles relied on the terms "kidnaps or carries away" to describe defendants' acts. In Tanner Mr. Justice Seawell makes it clear that section 209 is not the same crime as kidnaping in section 207. At page 293 he says, regarding the 1933 act: "It will be noted that the *forcible taking* of any person with intent to commit extortion or robbery, the [illegible] of which the defendants were convicted, is

made a felony. The only change made by the amendments of 1933 [adding *inter alia* "kidnaps or carries away"] *so far as they affect the instant case* was to increase the penalty if the person forcibly taken suffers bodily harm." (Emphasis added.) This means that defendants could have been convicted under the 1901 act *before* the words "kidnaps or carries away" were added.

Defendants in Tanner attacked the great departures section 209 made from the common-law definition of kidnaping. At page 296 Mr. Justice Seawell says: "No reason had been given why it is not within the purview of the sovereign power of the state to pronounce or classify as an act of kidnaping (following closely the language of the statute), the act of seizing and *confining* a person by *any means whatever*. . . ." (Emphasis that of the court.) The Tanner case therefore does not bear on the meaning of kidnaping as defined by section 207.

The Knowles decision is even clearer in its reliance on terms other than "kidnaps or carries away." Mr. Justice Traynor cites Tanner at page 184: "On appeal from their conviction under section 209, they [Tanner *et al.*], contended that their offense was only armed robbery and that the Legislature did not intend to punish it under a kidnapping statute. The court affirmed the conviction, holding that the Legislature is empowered to define criminal offenses as it sees fit and that the statute clearly indicates an intention to punish *standstill* kidnapping under its provisions. It is suggested that under the statute there must be movement of the victim, under a preconceived plan for protracted detention to obtain property that would not be available in the course of ordinary armed robbery. Defendant seeks to read into the statute a condition that the victim be moved a substantial distance. The statute itself

is a refutation of that contention. Movement of the victim is only one of several methods by which the statutory offense may be committed. The statute provides that 'Every person who *seizes, confines* . . . . or who *holds* or *detains* [any] individual . . . to commit extortion or robbery . . . . is guilty of a felony.'" (Emphasis added.)

These cases left the terms "kidnaps" and "carries away" unconstrued within the context of section 209. In determining the movement necessary to constitute a violation of section 209, all cases relied on Tanner or Knowles.

After the 1951 amendment here under consideration, this court held in People v. Chessman, 38 Cal. 2d 166 (see p. 192) [238 P. 2d 1001] that defendant's act of transporting a victim 22 feet was within the compass of "kidnaping or carrying away" in section 209. The majority did not analyze the meaning of the terms in that opinion but rather relied on these authorities:

(1) People v. Raucho, 8 Cal. App. 2d 655 [47 P. 2d 1108]. This case was decided in 1935 under the broad 1933 amendment to section 209 and the court cited Tanner as its authority that there is no distance requirement under section 209.

(2) People v. Cook, 18 Cal. App. 2d 625 [64 P. 2d 449], decided in 1937, raised no issue of distance.

(3) People v. Melendrez, 25 Cal. App. 2d 490 [77 P. 2d 870], was a case strictly within the confines of section 209 before 1951.

(4) People v. Shields, 70 Cal. App. 2d 628 [161 P. 2d 475], decided in 1945, involved a defendant who carried a child an unstated distance to the roof of an apartment from a point in the neighborhood. The issue of distance was not raised.

(5) People v. Oganesoff, 81 Cal. App. 2d 709 [184 P. 2d 953] (1947), in which defendants forced a woman into their car, drove her from Compton to Torrance, and forced her into a house.

(6) Cox v. State, 203 Ind. 544 [177 N. E. 898, 181 N. E. 469] determined an asportation of 90 feet was sufficient under a statute not similar to Penal Code, section 207. Asportation "'*from* any place within this state'" was made punishable (§2426, Burns 1929 Supp.). This patently refers to shorter distances than the terms "into another part of the same county" in section 207. The Indiana statute relates the taking to the place where the taking *begins;* section 207 refers to the place where it *ends.*

(7) State v. Taylor, 70 N. D. 201 [293 N. W. 219], held a short-haul asportation to be within a kidnaping statute substantially similar to section 209, in that it employs the words "seized, confines, inveigles, or kidnaps" to describe the crime. The term "kidnap" is not elsewhere described in North Dakota statutes. This case cites People v. Melendrez, *supra,* 25 Cal. App. 2d 490, as authority for its own holding.

Therefore only two of these cases, Cook and possibly Shields, furnish authority for the proposition that short-haul asportation satisfies section 207. And the issue of whether or not the asportations were sufficient under the section was never before the courts.

It is therefore my opinion that this court should reexamine its construction of the word "kidnaps" as used in section 209 and define it as it was meant to be defined by section 207.

Another consideration ignored by the majority is this: The patent intent of the Legislature in amending section 209 in 1951 was to remove simple robbery from the bounds

of section 209. Previously, simple robbery invariably constituted short-haul kidnaping (see "Robbery Becomes Kidnaping," 3 Stanford L. Rev. 156, a note on People v. Knowles, *supra*, 35 Cal. 2d 175). This legislative intent was followed by Mr. Justice Vallée in reversing a conviction in People v. Taylor, 135 Cal. App. 2d 201 [286 P. 2d 952]. The case which stimulated the Legislature to action was People v. Knowles, *supra*, 35 Cal. 2d 715. It is important to note that victims were forced to move in that case and this constituted short-haul kidnaping. In People v. Chessman, 38 Cal. 2d 166 (see p. 192) [238 P. 2d 1001], this court held the Knowles problem was not solved by the 1951 amendment. As a result of Chessman and the instant decision, while robbery is not *per se* a violation of section 209, if the robber moves his victim *one inch* he is subject to the death penalty. This can hardly be described as giving force to the legislative act.

Lastly, if it is possible without doing violence to its words, a statute is to be construed to have a constitutional application. The majority have construed it to provide the death penalty for *de minimus*. This is within the compass of cruel and unusual punishment and such a construction should be avoided. Section 4 of the Penal Code directs the courts to construe its provisions according to the *fair* import of their terms, with a view to effect its *objects* and to promote *justice*.

I conclude that defendant has not been guilty of kidnaping within the purview of either section 207 or section 209 and the convictions and judgments thereof must be reversed and the counts of the information alleging them stricken.

*The Phrase "Carries Away" Is Ambiguous.*

Even if defendant did not "kidnap" his victims, he would still be guilty of violating section 209 if he "carried away" any one of them. We must therefore scrutinize the phrase "carries away" in section 209.

If we were to say that to "carry away" meant no more than to cause a victim to move one foot we should necessarily include the more rigidly defined term "kidnap," since any act constituting "kidnaping" would also constitute "carrying away." This would make "kidnaps" redundant in section 209. "To carry away" must therefore differ from "to kidnap" in some way other than in the distance required to consummate the crime. But the statutes and cases of California establish no clue as to the acts which deserve this label. The brief of the attorney general does not attempt to assist us.

Penal Code, section 7, subdivision 16, states: "Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning. . . ."

Webster's Unabridged Dictionary defines "carry away" thusly: "a To remove from life [refers to death]; . . . c To take possession of the mind; to move, sway, or charm; to delude; as, to be *carried away* by music, or by temptation . . . d To succeed in obtaining; to be victorious in or over; to win; also, *Obs.*, with *it*, to gain the victory; carry the day."

These definitions do not fit the factual context of the instant case, nor do they appear to have any meaning relative to any forced movement of a person.

The word "away" is defined thusly by Webster: "1. On the way; onward; along. 2. From a place; hence; thence; —of motion; as, go *away*; . . . 4. a From contact or close association; aside; off . . . 5. From one's possession;— with a sense of parting or loss; as, to give one's heart *away*. . . ."

Meaning 2. of away, "From a place" may be relevant. Still, the term "place" is unclear since it may be used in such contexts as "To move away from the window," or "to move away from home." Its meaning as to distance is entirely contextual. To give it a meaning outside a context, as the Legislature has attempted to do, is meaningless. "Away" begs us to answer the query "from what?"

Blackstone says that larceny required a "carrying away." (Jones, Blackstone, p. 2440.) This element was satisfied by the slightest movement of the item to be taken. The essence of this common law crime was disturbance of possession and the movement of the property had to be accompanied by an intent to terminate the possession permanently. To rip a phrase from a finely woven context would make a crude patchwork of the statute. The disturbance of possession of personalty bears little resemblance to the deprivation of human freedom. They are different social menaces and terms used to describe them necessarily find themselves in dissimilar contexts playing semantical tricks on the unwary. I conclude that the technical meaning of "carries away" is relevant only to the context of personal property law and has no commonly recognized technical application to the realm of crimes against liberty.

The vernacular usage of the term may provide help. Suppose one says, "X carried Y away." What image arises in the mind of the hearer: Certainly not a picture

of X forcing Y to move about a few feet in his own home. Or suppose one wished to describe X's forcing Y to move from one room to another. Many descriptive words and phrases come to mind before "X carried Y away." For example, "X forced Y to move against his will." The word "away" just does not fit the facts. If the Legislature intended to include all forced movements within its definition of section 209 kidnaping for robbery, a simpler and clearer term would have been used. This is particularly true in view of the consternation raised by the decision in People v. Knowles, *supra*. The allusion to the command of Penal Code, section 4, is also pertinent here.

It is apparent that the 1951 amendment was enacted to assuage the mischief of the Knowles holding. In this context, this intent should not be construed into oblivion. And it certainly does not promote justice to hold that the movement of a person four feet is an offense sufficient to warrant the death penalty when the statute is open to another less strict interpretation.

I conclude that the phrase "carries away," as used in section 209, is undefined and meaningless; and that to hold that it encompasses defendant's acts is to misconstrue it violently.

*The Prejudicial Misconduct of the Deputy District Attorney.*

While the weight of the evidence is so massive against the defendant that I cannot say the prejudicial misconduct of the deputy district attorney was instrumental in the jury's finding defendant guilty, I am of the opinion that this misconduct was probably a major influence in the jury's decision to fix the penalty at death. In other words, this misconduct prejudiced defendant's chances to receive a life sentence rather than death:

(1) He identified defendant with Caryl Chessman and reminded the jury repeatedly that unless defendant were executed he might be released to commit other sex crimes. He stated that Chessman had been paroled before committing the more publicized crimes of which he was accused. This must have carried considerable weight in the jury's consideration of the penalty. Yet, defendant and not Chessman was on trial, and defendant was entitled to have his case determined on the record of his own trial.

(2) The inflammatory ephithets used to describe defendant must have had an emotional effect on the minds of the jurors. Powerful words, portraying the images and associations they conjure, participate actively in forming human judgments. In a trial as emotionally conceived as this one was, they are particularly decisive. No objection or admonition could cure this psychological onslaught: Once spoken, the emotional impact of the words was locked in the minds of its hearers. The cases cited by the majority to justify requiring an objection, involve the failure to object to evidence. An admonition to ignore certain testimony in reaching a factual conclusion in a logical manner may be effective. But it is far harder to blot out an emotion or a vivid image from the mind of a juror. In this case I do not think it would have been possible. It has been truly said: "You can't unring a bell."

*The Penalties Inflicted in This Case Constitute Punishments Which Are Cruel or Unusual.*

Consider the precise acts for which this court is affirming the death penalty. Defendant seized and bound the hands of C. E. She told him where her money was but he took none. He helped her onto a bed 4 or 5 feet away and forced her to perform sex acts. He was clearly guilty of rape and perversion. The penalty for rape is not less than

three years in the state prison. For perversion it is not more than 15 years in the state prison or less than one year in the county jail. These were brutal and revolting acts. But for moving C. F. 4 or 5 feet, "helping" her to the bed, he is to be executed. But for this movement he would not have received the death penalty! The case involving U. H. is similar except that he did not rape her. Defendant committed the same atrocities on A. H. as he did on C. F. and in fact did more harm to her than to U. H. But in attacking A. H. he merely threw her to the floor and raped her and committed perversion. But his penalty for this was not death, but two prison terms! Why? Because he did not move her the necessary *one inch* nor incidentally ask for her money! Of the condemned movements one must ask: What difference did they make? The answer: None.

The above comparisons reflect the absurd position into which this court has backed by following the Tanner, Knowles and Chessman cases to the consistent but irrational ultimate. Holmes' epigrammatic "A page of history is worth a volume of logic" has found its supreme justification.

In each of the other three situations involving the death penalty, if the victim had not been moved a few feet there would be no death penalty possible. Under the rule of this case a robber who shoves his victim against a wall is eligible for the gas chamber if a prosecutor arbitrarily chooses to ask for that penalty. Essentially section 209 may be used by a zealous prosecutor to kill one who has committed other more socially condemned crimes which carry less severe penalties. The instant case is the archetype. The deputy district attorney prosecuting Wein did this overtly. In his summation he demanded the death penalty not for defendant's moving his victims but for the sexual assaults

he made upon them. He cited the military law which inflicts the death penalty for rape. He belabored the lecherous acts alleged done to L. S., then said: "If this is not treatment which earns this defendant the extreme penalty of death, I never saw any. There is not a red blooded man on this jury, there isn't a respectable woman on this jury who in my opinion would say otherwise." His only reference to the movement of L. S. was: "He moves her; that is kidnapping for the purpose of robbery, as I explained it to you here. . . ." He also said: "I have only one regret in arguing this case to you, and that is that under the law of this state, for the reason that the defendant did not announce as his purpose robbery at any time to K. S., that I cannot charge him with kidnapping for the purpose of robbery with bodily harm and ask you to return a sixth verdict of death."

I conclude that the defendant is in effect, being condemned to death for *de minimus* acts. Were the case before me, I should also say imprisonment for life or a long term of years would also fall within the scope of cruel or unusual punishment.

This court properly refuses to "draw lines" delineating what distance is sufficient to constitute kidnaping. It is the task of the Legislature. The Legislature attempted by its 1951 amendment to do this and failed to communicate its intent to this court. The court has chosen to label all short-haul asportations "kidnaping." The holding in this case that an asportation of four feet is sufficient to send a man to the gas chamber illustrates in unshaded tones that *all* short-haul asportations must be declared without sections 207 and 209 or not punished by the courts.

This does not mean that no violation of section 207 or section 209 should be punished in the degree determined by

the Legislature. It means that the penalties assessed *in this particular case* are too severe because the statute, as construed by the majority, is overly broad. While precise lines must be drawn by the Legislature, the penalties assessed for the alleged offenses in this case are blatantly on the forbidden side of it. The judiciary may not abdicate its responsibility to condemn a violation of constitutional powers with a question-begging cliche about separation of powers.

Mr. Justice McKenna, writing for the Supreme Court in Weems v. United States, 217 U. S. 349, at 378 [30 S. Ct. 544, 54 L. Ed. 793], faced this problem squarely:

"We disclaim the right to assert a judgment against that of the Legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is involved. Then the legislative power is brought to the judgment of a power superior to it for the instant. . . . They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge."

Mr. Chief Justice Warren described clearly the problem of definition: "This Court has had little occasion to give precise content to the Eighth Amendment, and in an enlightened democracy such as ours, this is not surprising." (Trop v. Dulles, 26 Law Week 4219 at 4223.)

The cases facing this problem of definition may be divided into four groups:

(1) Those in which the penalty was found not excessive in relation to the offense;

(2) Those in which the court held the Legislature free to prescribe even outrageous penalties;

(3) Those holding the phrase "cruel and unusual punishment" refers only to uncivilized forms of punishment such as quartering;

(4) Those holding punishment clearly disproportionate to the offense to be unconstitutionally cruel, unusual, or both.

The problem in California is simpler than that faced by the federal courts, since our guarantee is stated disjunctively: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel *or* unusual punishments be inflicted." (Cal. Const., art. I, § 6.)

I believe the most persuasive authority supports my judgment that clearly excessive punishments are unconstitutional.

The defendant in Weems v. United States, *supra*, 217 U. S. 349, received a statutorily mandatory sentence of 12 years at hard labor in irons plus the permanent loss of many civil rights for falsifying two entries in an official cash book. Mr. Justice McKenna says of this sentence at page 377:

"It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bills of rights, both on account of their degree and kind."

Chief Justice Warren continued in Trop v. Dulles, *supra*, 26 Law Week 4219 at 4223, concerning the Weems decision:

"The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not

static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In O'Neil v. Vermont, 144 U. S. 323 [12 S. Ct. 693, 36 L. Ed. 450], the court held the Eighth Amendment does not inhibit state action. The defendant was sentenced to 54 years in prison for sales of liquor during a single day. Justices Field, Harlan and Brewer dissented on the ground that the Fourteenth Amendment gave the Eighth Amendment protection against the states. They agreed that the inhumane sentence in this case contravened the Eighth Amendment.

Two compelling reasons for condemning excessive sentences are stated in Cox v. State, 203 Ind. 544 [177 N. E. 898, 181 N. E. 469, at 471]. The court quotes United States v. Borromeo, 23 Philippine 279 at 289:

"A contrary view leads to the astounding result that it is impossible to impose a cruel and unusual punishment so long as none of the old and discarded *modes* of punishment are used; and that there is no restriction upon the power of the legislative department, for example, to prescribe the death penalty by hanging for a misdemeanor, and that the courts would be compelled to impose the penalty. Yet such a punishment for such a crime would be considered extremely cruel and unusual by all right-minded people."

At page 472 the Indiana court in Cox v. State, 203 Ind. 544 [177 N. E. 898, 181 N. E. 469], suggests that the reason the issue of a punishment's cruelty and unusualness is not often before the appellate courts is that juries are

so constituted as to find persons innocent when the punishment for an alleged offense offends their sense of justice. Obviously this element could not sway the jury so to favor a defendant whose sex crimes cried for vengeance.

The finest exposition of the doctrine of unconstitutional excessiveness is State v. Ross, 55 Ore. 450 [104 P. 596, 42 L. R. A. N. S. 601]. Defendant was sentenced to five years in the state prison and fined $576,853.74 for embezzling $288,426.87 in state funds. He was to be imprisoned in the county jail until the fine was paid, but not longer than 288,426 days or approximately 790 years. The court reversed the sentence of imprisonment for nonpayment of the fine on the ground that it was cruel and unusual punishment.

There is language in California cases upholding this position. *Ex parte* Karlson, 160 Cal. 378, at 383 [117 P. 447, ann. cas. 1912D, 1334], said the danger that persons imprisoned for contempt were protected against excessive restraint by the constitutional rule against cruel or unusual punishments.

In *In re* Finley, 1 Cal. App. 198 [81 P. 1041], the court rejected arguments that excessive sentences were not unconstitutional, but held the death penalty for an assault by a life convict was justified. The court said at pages 201-202:

"It is only when the punishment is out of all proportion to the offense, and is beyond question an *extraordinary penalty* for a crime of *ordinary gravity committed under ordinary circumstances*, that courts may denounce it *as unusual*."

*Contra* this position is *In re* O'Shea, 11 Cal. App. 568 [105 P. 776], which contains a dictum, at page 575, that only punishments of a barbarous character, like quartering, are cruel and unusual. (The court used the conjunctive.)

There is language in People v. Tanner, *supra*, 3 Cal. 2d 279, at 298, which may be read to mean that the death penalty for kidnaping is not excessive. But it is insufficient to paste a label to an act and justify enormities by it. This illustrates the profundity of the insight: "What's in a name?" It is tantamount to playing categories with human life. Moving a person four feet does not justify taking life no matter what words describe the act.

Other cases which uphold the proposition that excessiveness is fatal to a sentence are: Application of Cannon, 203 Ore. 629 [281 P. 2d 233] (life imprisonment for assault to commit rape held cruel and unusual); State v. Devore, 225 Iowa 815 [281 N. W. 740, 118 A. L. R. 1104] (imprisonment until fine paid held cruel and unusual); Williams v. State, 125 Ark. 269 [188 S. W. 826] (sentence to solitary confinement for a misdemeanor held cruel and unusual); State v. Whitaker, 48 La. Ann. 527 [19 So. 457, 35 L. R. A. 561] (sentence of six years for destroying plants held cruel and unusual); State v. Driver, 78 Kenan's N. C. Repts. 366 (N. C.) (imprisonment in county jail for five years and recognizance of $500 to keep the peace for five years thereafter for assault and battery held cruel and unusual); Sinclair v. State, 161 Miss. 142 [132 So. 581 at 582 [74 A. L. R. 241] (two justices' concurring opinion said sentencing an insane person to life

imprisonment is cruel and unusual); State v. Mollen, 140 Minn. 112 [167 N. W. 345, 347, 1 A. L. R. 331] (a prison term flagrantly excessive would be cruel and unusual); McDonald v. Commonwealth, 173 Mass. 322 [53 N. E. 874, 875, 73 Am. St. Rep. 293] (imprisonment may be so long as to be cruel and unusual).

I conclude that the death penalties inflicted on this defendant for moving five victims from four to 75 feet cannot stand in the face of the constitutional mandate that cruel or unusual punishment may not be inflicted. The judgments must therefore be reversed. The acts of moving K. S. 10 feet and A. C. 13 feet are serious enough to warrant punishment. The minimum punishment prescribed for these acts, one year in the state prison, may not be excessive for them.

## APPENDIX B.

**Modification of Opinion (50 A. C. 316, ..... P. 2d .....).**

[Crim. No. 6130. In Bank. June 25, 1958.]

The People, Respondent v. Edward Simon Wein, Appellant.

The Court.—The opinion herein appearing in 50 A. C. at page 316 is modified by adding the following sentence at the end of the first paragraph, page 324: "Defendant's present counsel have been substituted for his trial counsel for the purpose of this appeal."